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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1064

WILLIAM A. WATERS and DONALD SAMUELS,

Petitioners,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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WILLIAM A. WATERS and DONALD SAMUELS,

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v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, William A. Waters and Donald Samuels, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 26, 1974.

Opinions Below

The opinion of the Court of Appeals, reported at 502 F.2d 1309, is reprinted in the Appendix hereto at pp. 1a-20a. The order of the Court of Appeals denying petitioners' Petition for Rehearing is set out in the Appendix at pp. 21a-22a. The Findings of Fact, Conclusions of Law, and Order of the District Court, which are not reported, are set out in the Appendix at pp. 23a-29a.

Jurisdiction

The judgment of the Court of Appeals was entered on August 26, 1974. Petitioners' timely Petition for Rehearing was denied on November 26, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Do the limitations of section 703(h) of Title VII of the Civil Rights Act of 1964, apply to or restrict the remedies available under 42 U.S.C. § 1981?

2. Does section 703(h) preclude the district courts in Title VII actions from providing a remedy for a seniority system which perpetuates the effects of past discrimination and has a discriminatory impact on black employees and job applicants?*

3. Is an aggrieved employee's right to additional back pay cut off when he declines to accept a job offer from the defendant employer, where (a) the job offered is less desirable than the job to which he is entitled, (b) the job offered is less desirable than the job he then holds, and (c) the offer is conditioned on a waiver by the employee of some or all of his remedies for past discrimination?

Statutory Provisions Involved

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, provide:

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* See *Franks* v. *Bowman Transportation Company*, No. 74-728.

Section 703(a), 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), 42 U.S.C. § 2000e-2(c):

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin.

Section 703(h), 42 U.S.C. § 2000e-2(h):

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Section 706(g), 42 U.S.C. § 2000e-5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

The Civil Rights Act of 1866, 42 U.S.C. §1981, provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Statement of the Case

This action was filed in December, 1968, in the United States District Court for the Northern District of Illinois by two black bricklayers alleging discrimination on the basis of race by the Wisconsin Steel Works of the International Harvester Company and the United Order of American Bricklayers and Stone Masons, Local 21, in violation of Title VII of the 1964 Civil Rights Act and of 42 U.S.C. §1981. Plaintiff Waters alleged that he was initially denied employment on the basis of race, and that he was subsequently hired for a short period of time but then laid off because he had less seniority than whites hired during the period when Wisconsin Steel refused to hire blacks. Plaintiff Samuels alleged that he had been denied employment because Wisconsin Steel gave preference to applicants who had previously worked for the company during the period when it employed only whites.

The District Court[1] upheld plaintiffs' factual allegations regarding the employment practices of Wisconsin Steel

[1] The district court had earlier dismissed the action on procedural grounds; the decision of the district court was reversed and the case remanded, *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970).

and Local 21. It held that prior to April, 1964,[2] Wisconsin Steel maintained a policy of racial discrimination in the hiring of bricklayers and hired only white applicants.[3] The District Court further found that after 1964 Wisconsin Steel, in laying off and recalling employees, had given preferential treatment to employees hired during the "white only" period, including white employees who had no contractual seniority rights because those rights had been waived in return for severance pay. The District Court concluded that this preferential treatment had the effect of continuing the impact of Wisconsin Steel's past policy of discrimination, and directly injured plaintiffs (24a-27a).

The record revealed that the seniority system and preferences guaranteed that any black bricklayer at Wisconsin Steel would be the first laid off, and that virtually all bricklayers hired would be white. Plaintiffs' qualifications were not disputed; Waters and Samuels had twenty and thirteen years of experience, respectively, as bricklayers. Among the white bricklayers recalled ahead of Waters on grounds of seniority were bricklayers hired *after* Waters had been rejected for employment because of his race.

The District Court held that these practices constituted a violation of Title VII and of section 1981. It ruled that the defendants' seniority system, as well as the preferen-

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[2] Petitioner Waters had first sought employment at Wisconsin Steel in the Fall, 1957.

[3] Specifically, the district court found that black bricklayers had applied unsuccessfully for work on several occasions beginning as early as 1949, but that Wisconsin Steel did not hire a black bricklayer until April 1964; furthermore black laborers in Wisconsin Steel's mason department had sought transfer to Wisconsin Steel's apprentice program but were denied admission, supposedly on the basis of their age, even though whites were admitted into the program who were the same age as some of the black rejected applicants (24a-27a).

tial treatment for whites whose contractual seniority rights had been waived, had its genesis in a period of racial discrimination and was thus not a "bona fide" seniority system under Title VII. The District Court awarded $5,000 in back pay to Waters and Samuels, and directed Wisconsin Steel to offer both plaintiffs employment (27a-29a).

On appeal the Seventh Circuit upheld the District Court's findings of fact, but reversed on the ground that the district court was powerless to award most of the relief granted. The Court of Appeals ruled, as a matter of law, (1) that a contractual seniority system as well as an informal preference for employees whose seniority rights had expired, even though they perpetuated the effect of past discrimination, were absolutely protected from judicial scrutiny under Title VII by section 703(h), 42 U.S.C. §2000e-2(h), (2) that the limitations placed by section 703(h) on remedies under Title VII also applied to 42 U.S.C. §1981, (3) that the company could give white employees who had waived their seniority rights preference over plaintiff Samuels, although to do so over Waters was unlawful, and (4) that plaintiff Waters forfeited his right to any further back pay when, while his claim was pending, Wisconsin Steel offered him a job if he would waive his claim for retroactive seniority and otherwise prejudice his case, and he refused to take it (1a-20a).

Reasons for Granting the Writ

This case arises from a problem of discrimination which has long obstructed economic opportunity for blacks—the practice of hiring blacks last when employment is rising and firing blacks first when the workforce is reduced. The fact that minority workers were the most recently hired is seized upon by employers and unions as a justification for

laying off those workers before whites with greater company seniority. That in many firms most black employees were hired only in the last few years is a result of open and avowed discrimination prior to 1964, and of the continuation of that discrimination in more subtle but equally effective forms thereafter. This "last hired, first fired" form of discrimination is one of the primary reasons for the chronically higher level of unemployment among non-whites compared to white workers.

Under ordinary economic conditions the workforce at any given plant or office expands and contracts in response to seasonal variation in demand and the success or problems of the particular firm. The abolition of "last hired, first fired" discrimination against blacks is thus a matter of continuing concern. The problem is of particular importance now in a time of serious economic dislocation, with millions of workers being fired, laid off or furloughed due to falling production. In the last month alone unemployment rose by 930,000, and over the last year unemployment rose substantially faster among non-whites than among whites.[4] When the economy begins to recover from its present difficulties and employment begins to rise, the "last hired, first fired" principle will prevent black workers from participating fully in that new prosperity.

The decision of the Seventh Circuit strips the district courts of any power to remedy "last hired, first fired" discrimination. The Court of Appeals held that an employer in laying off employees could give preferential treatment to whites because they worked for the firm longer, and could in hiring give preference to whites because they had worked for the firm before. The Court of

[4] See generally: Bureau of Labor Statistics, *The Employment Situation*, January, 1975.

Appeals did not deny that this practice served to perpetuate the effects of past discrimination, but held that such discrimination enjoyed absolute immunity from legal attack because of Section 703(h) of Title VII of the 1964 Civil Rights Act. The decision deprives district courts in that circuit of any ability to fashion fair and effective relief appropriate to the circumstances of each case for such "last hired, first fired" discrimination. The decision of the Court of Appeals is squarely in conflict with the decisions of this Court and other courts of appeals, and with the policies and language of Title VII and 42 U.S.C. § 1981.

Previously this Court has resolved questions arising under Title VII regarding procedure[5] and standards of proof.[6] The critical issues of employment discrimination law at present involve remedies.[7] This case presents important questions involving the scope of remedial authority vested in the district courts once discrimination has been established.[8] The Court of Appeals decision

[5] See, e.g., *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); and *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

[6] See, e.g., *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971); and *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[7] See e.g., *Albemarle Paper Co.* v. *Moody*, No. 74-389 *cert. granted* December 16, 1974; and *Franks* v. *Bowman Transportation Company*, No. 74-728 *cert. pending*.

[8] This Court has spoken generally concerning the broad power of the federal courts to eliminate employment discrimination:

> Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin.

Alexander v. *Gardner-Denver Co.*, *supra* at 44; see also *McDonnell-Douglas Corp.* v. *Green*, *supra* at 800; *Griggs* v. *Duke Power Co.*, *supra* at 429-430.

resolved these questions in a manner which not only severely limits the district court's power but also would restrict the ability of the Department of Justice[9] and the Equal Employment Opportunity Commission[10] to obtain effective relief for victims of unlawful employment discrimination.

That the use of seniority as a criterion in layoffs and hiring is of unusual importance does not, of course, mean that this Court must adopt a *per se* rule that the application of such a standard is always, or never permissible. The use of seniority takes a variety of forms—contractual labor-management agreements, written or informal company policies, and *ad hoc* rules. Different minority employees present different problems—some were denied jobs on account of race before Title VII became law in 1965, other applicants were rejected for this reason after 1965, and still others did not apply to work for an employer until after the employer had ended such overt discrimination. The instant case involves several different types of problems.[11] Different situations may require different answers, but the decision below would prevent the district courts from fashioning remedies appropriate to the particular circumstances of each case. The very complexity of the possible legal situations accentuates the need for guidance from this Court.

[9] In several Title VII cases, the United States Department of Justice has secured decrees granting compensatory seniority to unlawfully rejected applicants. See, e.g., *United States* v. *Roadway Express, Inc.*, C.A. No. C-68-321 (N.D. Ohio) (consent decree entered September 1, 1970), partially repeated at 2 EPD ¶10,295 p. 1176 affirmed, 457 F.2d 854 (6th Cir. 1972); *United States* v. *Navajo Freight Lines, Inc.*, C.A. No. 72-116-MNL (C.D. Cal.) (supplemental order to consent decree entered January 15, 1973); *United States* v. *Pilot Freight Carriers, Inc.*, C.A. No. C-143-WS-71 (M.D.N. Car.) (consent decree entered October 31, 1972); *United States* v. *Georgia Power Co.*, 7 EPD ¶9167 (N.D. Ga. 1974), issuing decree on remand from 174 F.2d 906 (5th Cir. 1973); *Jones* v. *Lee Way Motor Freight, Inc.*, 7 EPD ¶9066, p. 6500 (W.D. Okla. 1973).

[10] EEOC's authority derives solely from Title VII. Thus, a limitation read into Title VII may hamstring EEOC in all its proceedings. The EEOC has filed 306 pending lawsuits, 174 of which seek relief from discrimination in hiring [information supplied by EEOC Litigation Services Branch, December 5, 1974]. And EEOC has thousands of pending administrative charges of discrimination involving refusals to hire.

I.

The Decision of the Court of Appeals That Section 703(h) of Title VII Limits the Remedies Provided by Section 1981 Is Inconsistent With the Decision of This Court in *Alexander* v. *Gardner-Denver Co.*

The allegations of plaintiffs' complaint, and the facts found by the District Court, clearly established a violation of 42 U.S.C. § 1981 and mandated an award of back pay as well as an injunction requiring the company to hire both Waters and Samuels with retroactive seniority. Section 1981, which forbids racial discrimination in the making of contracts, includes within its prohibition any racial discrimination in employment.[12] Waters first sought

[11] Wisconsin Steel had three sets of seniority rules: a written agreement with Local 21, an unwritten policy regarding laid-off employees whose recall rights had expired, and a special *ad hoc* rule for eight white employees who had waived their recall rights in return for severance pay. Plaintiff Waters was rejected for employment by Wisconsin Steel because of his race in 1957, before the adoption of Title VII. Plaintiff Samuels had not applied for employment with Wisconsin Steel until April, 1966 when he applied and was rejected because the company gave preference to former employees.

[12] The availability of 42 U.S.C. Section 1981 as an alternative jurisdictional basis for employment discrimination litigation free of the procedures incorporated in Title VII has been unanimously recognized by the Circuits. *Hackett* v. *McGuire Brothers, Inc.*, 445 F.2d 442 (3rd Cir. 1971); *Brown* v. *Gaston Dyeing Machine*

a job at Wisconsin Steel during the fall of 1957. Had he been white he would have been hired at that time, would have been laid off only infrequently in the following years, and would by now have accumulated 18 years of seniority. Instead, Waters was not hired until 1964, actually worked at Wisconsin Steel for less than three months; Waters was then not recalled until March, 1967, when he was once again laid off within three months. The Company's refusal to accord Waters the seniority to which he was entitled, in conjunction with its seniority system for layoffs and recalls, has clearly perpetuated the effects of its past discrimination. Similarly, when Samuels applied to Wisconsin Steel in 1966, he was rejected, not because he had less skill or less experience, but because he had not worked at Wisconsin Steel before, and the former employees hired instead were, because of the company's previous policy of discrimination, all white. As to Samuels as well, the company's seniority system served to continue into the future the effects of discrimination of years past.

The Court of Appeals did not deny that the facts found by the District Court would, prior to 1964, have established a violation of § 1981 and entitled plaintiffs to the relief they sought. The Court held, rather, that to the extent that section 1981 afforded plaintiffs any remedy, it had been repealed by Title VII of the 1964 Civil Rights Act. The Seventh Circuit concluded that the company's practices did not violate Title VII because of a loophole for certain seniority provisions contained in section 703(h), and then summarily rejected plaintiffs' section 1981 claim with the

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Co., 457 F.2d 1377 (4th Cir. 1972), *cert. denied* 409 U.S. 982 (1972); *Guerra* v. *Manchester Terminal Co.*, 498 F.2d 641 (5th Cir. 1974); *Long* v. *Ford Motor Company*, 496 F.2d 500 (6th Cir. 1974); *Brady* v. *Bristol-Myers Co.*, 459 F.2d 621 (8th Cir. 1972); *Macklin* v. *Spector Motor Freight Systems, Inc.*, 478 F.2d 979 (D.C. 1973).

words "having passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. Section 1981." (16a n.4). The Seventh Circuit apparently concluded that if a disputed employment practice was not forbidden under Title VII it was *ipso facto* legal under all other statutes prohibiting discrimination, and that any preexisting remedy for such discrimination broader than Title VII had been tacitly repealed by the 1964 Civil Rights Act.

This summary rejection of plaintiffs' section 1981 claim is squarely in conflict with this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander* this Court rejected the contention that aggrieved employees were limited to any single remedial provision.

> . . . (L)egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination[7] . . . (T)he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

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[7] See, e.g. 42 U.S.C. Section 1981 (Civil Rights Act of 1966); 42 U.S.C. Section 1983 (Civil Rights Act of 1871).

id. at 47-49; see also *Morton* v. *Mancari*, 417 U.S. 535, 545-549 (1974).[13] It is the very essence of "overlapping remedies" that discrimination not covered by one remedy

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[13] Cf. *Johnson* v. *Railway Express Agency, Inc.*, O.T. 1974, No. 73-1543.

may be forbidden by another. This Court has repeatedly rejected the argument that other sections of the Civil Rights Act of 1964 or the Civil Rights Act of 1968 limit or repeal, substantively or procedurally, the provisions of the earlier Civil Rights Acts. *Jones* v. *Mayer*, 392 U.S. 409, 416 n. 20 (1968); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 405 (1969); *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 17 (1971).

That section 703(h) could have limited section 1981 is inconsistent with the established principle that repeals by implication are not favored. *Morton* v. *Mancari*, 417 U.S. 535, 549-550 (1974); *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939). In the area of employment discrimination the intention of Congress *not* to repeal or limit pre-existing or parallel remedies is "clear and manifest".[14] In both 1964 and 1972 Congress expressly rejected proposals to make Title VII the exclusive remedy for employment discrimination.[15]

Other circuits have, consistent with *Alexander*, uniformly rejected attempts to impose on other remedies the limitations applicable to Title VII. See e.g., *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 172 (3rd Cir. 1971), *cert. denied* 404 U.S. 859 (1971) (Section 703(j) of Title VII could not limit the remedial scope of Executive Order 11246); *Guerra* v. *Manchester Terminal Co.*, 498 F.2d 641, 653-4 (5th Cir. 1974) (Title VII's failure to prohibit discrimination in favor of citizens does not limit the protection afforded aliens by section 1981); *Watkins* v. *United Steel Workers of America*, 369 F. Supp. 1221, 1230-31 (E.D. La. 1974).

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[14] *United Packinghouse, etc. Union* v. *N.L.R.B.*, 416 F.2d 1126, 1133, n.11 (D.C. Cir. 1969), *cert. denied* 396 U.S. 903 (1969).

[15] See 110 Cong. Rec. 13650-13652 (1964); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 48, n.9.

The Seventh Circuit's decision imposing on section 1981 the limitations which it believed to exist under Title VII is precisely the approach Congress rejected when it refused to make Title VII the exclusive remedy for racial discrimination in employment, and warrants summary reversal in the light of *Alexander* v. *Gardner-Denver Co.*

II.

The Decision of the Court of Appeals That Section 703(h) Protects Seniority Systems Which Perpetuate the Effects of Past Discrimination Is In Conflict With the Decisions of Other Circuits.

The District Court awarded both plaintiffs injunctive and monetary relief under Title VII because defendants' seniority system had operated to perpetuate the effects of past discrimination. The Court of Appeals did not deny that the company had discriminated in the past, or that the seniority system had the effect of continuing the discriminatory impact of that prior misconduct. The Seventh Circuit overturned the awarded relief solely on the ground that section 703(h) placed this discriminatory impact outside the scope of Title VII's prohibition or remedies.

Section 703(h) provides

> [I]t shall not be an unlawful employment practice for an employer to apply . . . different terms and conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race.

42 U.S.C. § 2000e-2(h). The Court of Appeals read 703(h) as establishing a *per se* rule that any contractual seniority

system, and as to new applicants any informal or *ad hoc* seniority rule,[16] is excluded from the reach of Title VII regardless of whether it has a discriminatory impact.

The decision of the Seventh Circuit is the latest development in a controversy now dividing, and confounding, the lower courts as to whether section 703(h) protects a seniority system even if the system perpetuates the effects of past discrimination and, solely because of their race, gives preferential treatment to whites in layoffs and recalls. That controversy appears in the guise of one of three questions —(1) Can such a seniority system be used to determine the order of layoffs and recalls? (2) Can minority workers who were or would have been denied employment in the past be given "retroactive" seniority to overcome the discriminatory impact of such a system? (3) Is a system with such an impact *bona fide*? In most cases these questions as a practical matter yield identical answers as to the impact of section 703(h); it is a measure of the confusion wrought by this problem that the answers to these different questions within a single circuit have not always been consistent.[17]

[16] In addition to the contractual seniority agreement between Wisconsin Steel and Local 21, the company adopted a special *ad hoc* rule granting a hiring preference to eight white former employees who had waived recall rights in return for severance pay. The Seventh Circuit held that as to a former employee like Waters, this *ad hoc* rule was an illegal act of discrimination but that, as to a new applicant like Samuels, the rule was a *bona fide* seniority system outside the reach of Title VII. The logic of this distinction is not irresistible.

[17] Thus the position advocated by petitioners might be stated to be (1) that the seniority system was covered by section 703(h), but coverage does not protect the system when it has such an impact, (2) that 703(h) did not bar giving minority employees sufficient seniority to overcome any discriminatory effect, or (3) that the system was not covered by section 703(h), according to which question is asked.

In the instant case the Seventh Circuit cast the issue in the form of the first question and concluded that section 703(h) protects the use of seniority in hiring and layoffs regardless of its discriminatory impact. The same position has been taken by the Third Circuit in *Jersey Central Power & Light Co.* v. *Electrical Workers, Local 327*, —— F. 2d ——, 9 FEP cases 117 (3d Cir. 1975). The Third Circuit ruled that a labor agreement which provided for the use of company seniority to determine layoffs and recalls would have to be adhered to even though it might continue the effects of past race and sex discrimination and even though it might negate the affirmative steps which had been taken to eradicate the effects of discrimination pursuant to an agreement that had been entered into by the company, union, and the EEOC. *Id.* at 130-32.

The contrary position was taken by the Sixth Circuit in *Meadows* v. *Ford Motor Company*, —— F.2d ——, 9 EPD ¶ 9907, pp. 6771-72 (6th Cir. 1975). In that case the defendant company had refused to hire women because of their sex. The Sixth Circuit held that, in order to afford relief to the victims of discrimination, the plant seniority system governing layoffs and recalls would have to be changed since that system violated Title VII by continuing the effects of past discrimination.[18] Similarly, in *Watkins* v. *United Steel Workers*, 369 F.Supp. 1221 (E.D. La. 1974) the court prohibited the use of seniority in determining which employees would be laid off and recalled. The district court held that it was a clear violation of Title VII to make employment decisions on the length of service,

[18] The Sixth Circuit in *Meadows* remanded the case back to the district court for a consideration of balancing the equitable factors concerning the victims of the hiring discrimination with the interests of the incumbents. The Sixth Circuit stated that reconciliation of these competing interests would be difficult, but not impossible. This is the traditional function of a district court in equity; however, it is exactly what the broad prohibition of *Waters* would prohibit.

where blacks had been, by virtue of prior discrimination, prevented from accumulating seniority. 369 F.Supp. at 1226-27.

Although unions may technically be "employers" under Title VII, and thus hiring hall preferences for union members of long standing are seniority systems, the Eighth Circuit has forbidden the use of such seniority in giving preferences in hiring hall referrals. *United States* v. *Sheet Metal Workers, Local 36,* 416 F.2d 123, 131, 133-34 n.20 (8th Cir. 1969), rev'ing 280 F.Supp. 719, 728-730 (E.D. Mo. 1969).[19] Similarly, Fourth, Fifth and Sixth Circuits have forbidden the use of seniority as a factor in promotions in cases where the employer had in the past discriminated in hiring on account of race.[20]

The dispute regarding the use of retroactive seniority to overcome the discriminatory effect of seniority systems has also divided the circuits. In *Franks* v. *Bowman Transportation Co.,* 495 F.2d 398, 414 (5th Cir. 1974), *cert. denied,* 43 LW 3330 (1974)[21] the Fifth Circuit held such relief was precluded by section 703(h):

[19] See also *Dobbins* v. *Electrical Workers Local 212,* 292 F.Supp. 413 (S.D. Ohio 1968), aff'd as later modified, 472 F.2d 634 (6th Cir. 1973); *EEOC* v. *Plumbers, Local Union No. 189,* 311 F.Supp. 468, 474-476 (S.D. Ohio 1970), vac'd on other grounds 438 F.2d 408 (6th Cir. 1971, *cert. denied,* 404 U.S. 832 (1971).

[20] *Rowe* v. *General Motors Corp.,* 457 F.2d 348, 358 (5th Cir. 1972); *Allen* v. *City of Mobile,* 331 F.Supp. 1134, 1142-1143 (S.D. Ala. 1971), *aff'd per curiam* 466 F.2d 122 (5th Cir. 1972), *cert. denied* 412 U.S. 909 (1973); *Afro-American Patrolmen's League* v. *Duck,* 366 F.Supp. 1095, 1102 (N.D. Ohio 1973), aff'd in pertinent part 503 F.2d 294 (6th Cir. 1974); *Harper* v. *Mayor and City Council of Baltimore,* 359 F.Supp. 1187, 1203-1204 (D. Md. 1973), aff'd *sub nom Harper* v. *Kloster,* 486 F.2d 1134 (4th Cir. 1973); *Loy* v. *City of Cleveland,* 8 FEP Cases 614 (N.D. Ohio 1974); see also *Bridgeport Guardians, Inc.* v. *Members of Civil Service Com'n,* 497 F.2d 1113, 1115 (2nd Cir. 1974).

[21] A second petition for certiorari which presents the question of whether district courts have the authority to award retroactive seniority as a remedy for hiring discrimination is pending. *Franks* v. *Bowman Transportation Company,* No. 74-728.

> . . . We do not believe that Title VII permits the extension of constructive seniority to them [the black victims of discrimination] as a remedy, section 703(h). . . . The discrimination which has taken place in a refusal to hire does not affect the bona fides of the seniority system.

In *Jurinko* v. *Edwin L. Wiegand Co.,* 477 F.2d 1038, vacated and remanded on other grounds, 414 U.S. 970, reinstated 497 F.2d 403 (3rd Cir. 1974), the Third Circuit reached the opposite conclusion:

> We can perceive no basis for the trial court to have refused to award back seniority or for its conclusion that "the plaintiffs are to be offered employment in production with the company, of course, as new employees". Seniority is, of course, of great importance to production workers for it determines both opportunities for job advancement and the order of layoff in the case of a reduction in a company's operating forces. It is our view that the plaintiffs are entitled to seniority and back pay dating from the time of the discriminatory employment practice up to the time they are actually reinstated. Only in this way will the present effects of the past discrimination be eliminated.

477 F.2d at 1046. The Sixth and Eighth Circuits have also sanctioned the award of retroactive seniority. *Meadows* v. *Ford Motor Company,* —— F.2d ——, 9 EPD ¶9907 (6th Cir. 1975). *United States* v. *Sheet Metal Workers, Local 36,* 416 F.2d 123, 131, 133-34, n.20 (8th Cir. 1969).[22]

[22] Several district courts have also specifically held that Title VII permits the district courts to provide retroactive seniority or some other relief for discrimination which results from a last hired, first fired seniority system. *Watkins* v. *United Steelworkers of America, Local 2369,* 369 F.Supp. 1221 (D.C. La. 1974); *Delay*

Similar conflict exists as to whether a seniority system with a discriminatory impact is *"bona fide"* within the meaning of section 703(h). *Jersey Central Power & Light Co.* v. *Electrical Workers, Local 327* concluded that such a system could qualify as *bona fide* and thus falls under the protection of §703(h).

> "We thus conclude in light of the legislative history that on balance a facially neutral company-wide seniority system, without more, is a *bona fide* seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices".

9 FEP Cases at 131. In *Quarles* v. *Phillip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1969), however, the court reached the opposite conclusion:

> Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination. Nothing in §703(h), or in its legislative history, suggests that a racially discriminatory system established before the Act is a *bona fide* seniority system under the Act.

279 F.Supp. at 517.[23] See also *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980,

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v. *Carling Brewing Company*, 9 EPD ¶9877 (N.D. Ga. 1974); see *Chance* v. *Board of Examiners*, No. 70 Civ. 4141 (S.D.N.Y. Feb. 7, 1975). See cases cited in Fn.9, *supra*, and Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L.Rev. 1589, 1629 (1969) (hereinafter cited as Cooper and Sobol).

[23] In these cases the courts have required the substitution of date-of-hire ("Company" or "plant") seniority for unit seniority to allow black employees equal access to jobs in formerly all-white units. These decisions adopt employment date as a nondiscrimina-

995-97 (5th Cir. 1969) *cert. denied* 397 U.S. 919 (1970).[24]

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tory seniority standard not because it is *per se* valid but because it accomplishes the remedial purpose of Title VII. The instant case requires a different remedy under the same principles because of a crucial factual difference—the existence of an all-white work-force. See also, *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied* 411 U.S. 939 (1973); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied* 406 U.S. 906 (1972); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973).

[24] The decision of the Court of Appeals conflicts with labor law decisions of this Court which establish appropriate relief under Section 10(c) of the National Labor Relations Act, 29 U.S.C. §160(c). The conflict is particularly significant because section 10(c) served as the model for Section 706(g), the remedial provision of Title VII. *United States* v. *Georgia Power Co.*, 474 F.2d 906, 921 n.19 (5th Cir. 1973); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 252 (5th Cir. 1974).

In NLRA cases this Court has consistently held that a victim of an unlawful employment practice must be placed in the position he would have occupied but for the discriminatory practice, *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). A remedy that leaves him "worse off" is inadequate, *id; Golden State Bottling Co.* v. *NLRB*, 38 L.Ed.2d 388 (1973), aff'g 467 F.2d 164, 166 (9th Cir. 1972). Accordingly, reinstatement to full status, including all seniority benefits, is necessary relief for an employee subjected to an unfair labor practice, including unlawfully rejected job applicants. Victims of unlawful hiring discrimination should therefore be reinstated on the same basis as those unlawfully discharged. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188 (1941); *Southport Co.* v. *NLRB*, 315 U.S. 100, 196 n.4 (1942); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 341, 348 (1938). See e.g., *Atlantic Maintenance Co.* v. *NLRB*, 305 F.2d 604 (3rd Cir 1962), enf'g 134 NLRB 1328 (1961); *NLRB* v. *Lamar Creamery Co.*, 246 F.2d 3, 10 (5th Cir. 1957), enf'g 115 NLRB 1113 (1956); *NLRB* v. *Cone Brothers Contracting Co.*, 317 F.2d 3, 7 (5th Cir. 1963).

Wisconsin Steel rejected Samuels' application solely[25] because it decided to rehire former white employees who had no contractual rights to recall and who had been hired during a period when the Company only hired white bricklayers. The Seventh Circuit rejected Samuels' claim that this preference for former employees was unlawful with the following blanket statement:

> We do not doubt that a policy favoring recall of a former employee with experience even though white before considering a new black applicant without experience comports with the requirements of Title VII and Section 1981.

(16a).[26] The Ninth Circuit took a contrary position in *Gates* v. *Georgia Pacific Corp.*, 492 F.2d 292 (1974). In that case, the defendant, in hiring for an accountant's job, gave a preference to present company employees. Since the firm had few, if any, eligible black employees, the preference had the effect of discriminating on the basis of race. The Ninth Circuit enjoined the use of such a preference reasoning that the policy *"as applied"* in the context of a past practice of excluding blacks was in violation of Title VII,[27] *id.* at 296. When an employer with a history of racially discriminatory hiring practices gives preference to its former employees, it does more than create a "built-

[25] At the time Samuels applied for work at Wisconsin Steel in April, 1966, he was an experienced bricklayer.

[26] The Seventh Circuit, while not expressly so stating, considered, in all likelihood, the informal or *ad hoc* recall of former white employees who had no contractual rights, as not a violation of Title VII because of its interpretation of Section 703(h).

[27] The Ninth Circuit, unlike the Seventh Circuit, properly analyzed the business reasons for the promotion-from-within policy in light of the "business necessity" test. *Gates* v. *Georgia Pacific Corp.*, *supra* at 296.

in headwind" to the equal employment opportunities of black applicants, see *Griggs* v. *Duke Power Co.*, *supra* at 432; it erects an insurmountable barrier to employment to those previously excluded on the basis of race.[28]

The limitation that the Seventh Circuit imposed on Title VII is inconsistent with the breadth of remedy contemplated by other provisions of that statute. Section 703(a)(2) defines as an unlawful employment practice any practice which would merely "tend to" deprive individuals of equal employment opportunities or adversely affect them because of race. 42 U.S.C. § 2000e-2(a). This Court, noting the broad sweep of this section, explained in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1970):

> Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

Similarly, Section 706(g) grants broad powers to the federal courts to remedy any discrimination they find. 42 U.S.C. § 2000e-5(g). In 1972, the Conference Committee Report explained that Section 706(g)

[28] The legislative history of Title VII supports the position of the Ninth Circuit. The passage of the Clark-Case Memorandum dealing with recall preferences states:

> . . . . Where waiting lists for employment or training are, prior to the effective date of the Title, maintained on a discriminatory basis, the use of such lists after the Title takes effect may be held an unlawful subterfuge to accomplish discrimination.

110 Cong. Rec. 6992 (April 8, 1964); see *United States* v. *Sheet Metal Workers*, *supra* at 133-34, n.20. The recall on the basis of length of service of former employees who have no contractual rights to recall is just such a "waiting list(s) for employment."

> requires that persons aggrieved by the consequences and effects of the unlawful employment practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 Cong. Rec. 3462 (daily ed., March 6, 1972).[29] The construction of Section 703(h) suggested by *Gates, Meadows, Sheet Metal Workers,* and *Jurinko* limiting that provision to seniority systems which do not have a discriminatory effect is more consistent with the broadly remedial purpose of Title VII and avoids any conflict between that provision and Sections 703(a)(2) and 706(g).

The Seventh Circuit's reading of the legislative history of Title VII is clearly erroneous. The Seventh Circuit did not deny that, but for section 703(h), Wisconsin Steel's seniority system would have violated Title VII. When Title VII was reported out by the House Judiciary Committee on November 20, 1963, it contained no such provision regarding seniority. Conservatives on the Committee criticized the bill on the ground that it would require a revision of seniority practices by employers who had discriminated on the basis of race.[30] The same objection to Title VII

[29] See also *United States* v. *Louisiana*, 380 U.S. 145, 154 (1965); *Griggs* v. *Duke Power Co., supra* at 429-430 (1971); *Vogler* v. *McCarty, Inc.*, 451 F.2d 1236, 1238 (5th Cir. 1971); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 243 (5th Cir. 1974); *Rock* v. *Norfolk & Western Rwy. Co.*, 473 F.2d 1344 (4th Cir. 1973), *cert. denied* 412 U.S. 933 (1973). *Cf. Corning Glass Works* v. *Brennan*, 41 L.Ed.2d 1 (1974).

[30] "If the proposed legislation is enacted, the President of the United States and his appointees—particularly the Attorney General—would be granted the power to seriously impair . . . the seniority rights of employees in corporate and other employment [and] the seniority rights of labor union members within their locals and in their apprenticeship program. . . .

"*The provisions of this act grant the power to destroy union seniority* . . . . with the full statutory powers granted by this

was voiced on the floor of the House,[31] and proponents of the bill did not deny this would be its effect. Congressman Dowdy proposed an amendment to exempt completely from coverage by Title VII any employment decision based on a seniority system;[32] the House rejected the amendment.[33] The House on February 4, 1964 adopted Title VII without any special language regarding seniority.[34]

The original Senate bill, reported out of the Commerce Committee on February 10, 1964, was similar to the House bill, and contained no provision similar to section 703(h). The initial Senate bill was also criticized on the ground that it would affect seniority rights. In response to this criticism Senator Clark, on a single occasion on April 8, 1968, before a nearly empty chamber, placed into the record the documents relied on by the Seventh Circuit suggesting that Title VII would have no effect whatever on seniority rights.[35] By the Seventh Circuit's own reasoning the Clark materials were erroneous, for, on April 8, the proposed civil rights bill did *not* contain section 703(h) or any comparable provision. On May 26, 1964, the Senate leadership offered a new civil rights bill of their own, containing §703(h). The language of this new provision, which bore no resemblance

bill, *the extent of actions which would be taken to destroy the seniority system is unknown and* unknowable". H. Rep. No. 914, 88th Cong., 1st Sess. 64-66, 71-72.

[31] 110 Cong. Rec. 2726 (1964) (Remarks of Rep. Dowdy).

[32] The proposed amendment provided "[t]he provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system . . . ." 110 Cong. Rec. 2727 (1964).

[33] 110 Cong. Rec. 2728 (1964).

[34] 110 Cong. Rec. 2804 (1964).

[35] See 110 Cong. Rec. 7207 *et seq.* (1964). The Clark construction also appears mistaken in the light of the bill's history in the House.

to the rejected Dowdy amendment, was explained by Senator Humphrey, one of the sponsors of the leadership bill:[36]

> [T]his provision makes clear that it is only discrimination on account of race, color, religion, sex or national origin that is forbidden by the title. The change does not narrow application of the Title, but merely clarifies its present intent and effect.

Neither Senator Clark, Senator Case, nor the Department of Justice ever offered any construction of or comment on section 703(h), which was adopted along with the rest of the leadership bill on June 19, 1964.[37] Congressman Celler, in explaining to the House the changes contained in the Senate bill, noted the provisions in section 703(h) regarding job-related testing but, apparently agreeing with Senator Humphrey's construction, did not mention the seniority language.[38] Under these circumstances the decision of the Seventh Circuit, construing section 703(h) on the basis of comments made by Senator Clark weeks before that section was ever written or proposed, was clearly mistaken.

[36] 110 Cong. Rec. 12,723 (1964).

[37] 110 Cong. Rec. 14,511 (1964).

[38] 110 Cong. Rec. 15896 (1964). Celler did mention such insignificant changes as those regarding corporations owned by Indian tribes and discrimination against atheists.

III.

The Decision of the Court of Appeals Limiting Waters' Right to Back Pay Is In Conflict With Decisions of the Third and Fourth Circuits.

The Seventh Circuit upheld the decision of the District Court that Wisconsin Steel discriminated against plaintiff Waters when on January 17, 1967 it gave recall preference to a former white employee who had waived his recall rights in return for back pay. Waters maintained that he continued to suffer monetary loss from that date until the present time and neither court below found otherwise. The Court of Appeals, however, ruled that as a matter of law Waters was only entitled to back pay for the period prior to September 5, 1967, when Waters declined an offer of employment at Wisconsin Steel.

Three critical facts, set out in the record, bear on the legal significance of this offer. First, the Company insisted that as a condition of returning to work Waters execute a waiver abandoning his then pending claim to be restored to the seniority he would have had but for the Company's initial refusal to hire him because of his race. Second, Waters was concerned that it would be argued that he had waived some or all of his rights merely by accepting the Company's offer and he so advised the Company in writing. The Company responded, not by assuring him it would not so argue, but by insisting he was entitled to neither back pay nor seniority.[39] Third,

[39] Waters wrote:

> I believe that International Harvester Company, Wisconsin Steel Division has discriminated against me because of my race, and I believe that I would lose some of my rights, privileges or immunities secured and protected by the Constitution and laws of the United States if I came back to

since Wisconsin Steel would accord him no seniority, Waters had every reason to believe he would promptly be laid off soon after starting work as he had been twice before. To take such a position and give up a more secure job he had with another firm would have been inconsistent with both common sense and Waters' obligation to mitigate his damages. The district court found that Waters had declined the September, 1967 offer of employment because it might prejudice his pending Title VII claim.

The Court of Appeals held that despite these conditions Waters had an absolute legal obligation to accept the job offered by Wisconsin Steel and forfeited any right to further back pay when he declined to do so. The Seventh Circuit's decision is in direct conflict with the decision of the Third Circuit in *Jurinko* v. *Edwin L. Wiegand Company*, 477 F.2d 1038 (3rd Cir. 1973) and the *en banc* decision of the Fourth Circuit in *Williams* v. *Albemarle City Board of Education*, —— F.2d ——, 8 EPD ¶ 9820 (4th Cir. 1974). In *Jurinko*, the employer had refused in 1966 to hire the plaintiffs because of their sex, but in February, 1969 offered them jobs with neither back pay nor the seniority to which they were entitled. The district court held their refusal to accept the jobs ended plaintiffs' right to further back pay. The Third Circuit reversed, reasoning:

> The terms of the 1969 job offers were within Wiegand's control, and it did not offer plaintiffs seniority or back pay. The offer that was made did not rectify the effect of its past discrimination, and the plaintiffs were under no duty to accept such an offer.

477 F.2d at 1038. In *Williams*, the plaintiff had been removed from his job as a school principal because of his race, but the defendants contended he had no right to back pay because he had rejected its offer of employment as a teacher. The Fourth Circuit rejected that contention and held the principal had no obligation to accept a position less than that to which he was entitled. 8 EPD at p. 6439.[40]

The decision of the Seventh Circuit on the facts of this case sanctioned a deliberate and callous attempt by Wisconsin Steel to sabotage Waters' pending claim by forcing him to choose between waiving his claim for seniority and back pay (if he accepted the job) and waiving any future back pay (if he did not). Such a legal maneuver is not consistent with the requirement that all waivers must be voluntary, *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), or with the public policy against any waivers of rights involving the public interest. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). If such job offers can have the effect claimed by the Court of Appeals, they will afford recalcitrant employers a ready means to prevent the enforcement of Title VII.

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work before the Equal Employment Opportunity Commission render their decision in this case.

I would like to know if Wisconsin Steel Works is prepared to pay me my lost time and place me on the seniority list in the position I should be in?

The Company responded:

We find that no monies are due you.

We reject your request that you be placed on the seniority list when, in fact, you have no accrued seniority, on the ground that such action would be in direct violation of our labor agreement.

[40] "[T]here can be little question that the alternative employment was of a kind inferior to that previously followed by the appellee . . . . More importantly, the acceptance of the alternative employment in this case could well have been regarded as an acquiescence by the appellee in his racially discriminatory demotion." *Id.*

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 73-1822, 73-1823, and 73-1824

WILLIAM A. WATERS and DONALD SAMUELS,

Plaintiffs-Appellants,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, a corporation, and UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, an unincorporated association,

Defendants-Appellees.

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21,

Defendant-Appellant,

v.

WILLIAM A. WATERS and DONALD SAMUELS,

Plaintiffs-Appellees.

INTERNATIONAL HARVESTER COMPANY,

Defendant-Appellant,

v.

WILLIAM A. WATERS and DONALD SAMUELS,

Plaintiffs-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 68 C 2483

WILLIAM J. CAMPBELL, *Judge.*

ARGUED APRIL 22, 1974 — DECIDED AUGUST 26, 1974

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and SPRECHER, *Circuit Judge.*

SWYGERT, *Chief Judge*. Plaintiffs William A. Waters and Donald Samuels, both black journeymen bricklayers, appeal from a judgment of the district court entered after a bench trial finding that the defendants had violated both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Section I of the Civil Rights Act of 1866, 42 U.S.C. § 1981. The plaintiffs' appeals center solely on the district court's approach to calculating the plaintiffs' back-pay award and attorneys' fees under Title VII. Defendants International Harvester Company (International), Wisconsin Steel Works of International Harvester Company (Wisconsin Steel), and Local 21, United Order of American Bricklayers and Stone Masons (Local 21), cross-appeal from the district court's finding that they violated § 1981 and Title VII.

International operates a large steel plant in Chicago, known as the Wisconsin Steel Works. It employs a small force of bricklayers to maintain and repair blast furnaces. Local 21 is the exclusive bargaining representative for the bricklayers employed by International.

Waters and Samuels initiated an action in the district court on December 27, 1968, claiming that certain employment practices and policies of International and joined in by Local 21 deprived them of rights secured by: Section I of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*; the Labor Management Relations Act, 29 U.S.C. § 185(a); and the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* Before filing their suit, plaintiffs in May, 1966 had registered complaints with both the Illinois Fair Employment Practices Commission and the United States Equal Employment Opportunity Commission (EEOC) charging Wisconsin Steel with racial discrimination due to Wisconsin Steel's lay-off of Waters and its subsequent refusal to rehire him and its failure to hire Samuels. The State Commission dismissed the charges as unsubstantiated; likewise the EEOC concluded in a February, 1967 decision that no probable cause existed to believe that Wisconsin Steel had violated Title VII. But as a result of new evidence that white bricklayers had been hired after Waters sought reinstatement and Samuels had requested initial employment, the EEOC reassumed jurisdiction and, on reconsideration, it determined that the plaintiffs had cause to sue.

Shortly thereafter the plaintiffs initiated their action as a class action against both International and Local 21. On defendants' motions, the district court dismissed plaintiffs' claims. On appeal we reversed and remanded the cause for a trial. *Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970). On remand the plaintiffs abandoned their class allegations and proceeded to trial on claims of individual discrimination against the two plaintiffs.

At trial Waters challenged the existence of Wisconsin Steel's "last hired, first fired" seniority system for bricklayers. Waters claimed the system violated section 1981 and Title VII in that it perpetuated alleged prior discriminatory policies and hiring practices of the defendants. In addition, both plaintiffs condemned as violative of Section 1981 and Title VII two amendatory agreements to the collective bargaining contract entered between Wisconsin Steel and Local 21 which affected employee recall rights and seniority status.

With respect to the seniority system as it relates to Waters, it was established at trial that the collective bargaining agreements between Wisconsin Steel and Local 21 have since 1946 provided for a "last hired, first fired" seniority system for bricklayers employed at Wisconsin Steel. The seniority system gives full credit to all bricklayers for their actual length of service or earned seniority as bricklayers. Seniority vests after a 90-day probationary period and may be broken by various events, including lay-offs in excess of two years. The system governs the order of lay-offs and recalls of bricklayers.

Waters first inquired about employment at Wisconsin Steel in the fall of 1957. He was told that no bricklayers were being hired. Approximately seven years later Waters inquired a second time for employment and was hired in July 1964. Two months later, in September 1964, Waters was laid off according to his length of service and before completing his 90-day probationary period and achieving contractual seniority status. Waters' lay-off was one of

several lay-offs during late 1964 and 1965 which occurred as a result of an anticipated decrease in the steel plant's bricklaying needs because of a fundamental change in the steelmaking process. (During this period, Wisconsin Steel was converting from twelve open-hearth brick-lined furnaces to two basic oxygen furnaces, and, consequently, it had been anticipated that the volume of brick maintenance work would be correspondingly reduced.) By March 1965, over thirty bricklayers with up to ten years seniority had been laid off. Wisconsin Steel had expected that over half of the laid-off bricklayers, including eight bricklayers with five to six years seniority, would not be recalled within the two-year period and that pursuant to the terms of the collective bargaining contract these bricklayers' contractual seniority rights would be lost.

During the course of the next year, however, Wisconsin Steel became aware that it had underestimated its bricklayer requirements for the basic oxygen steelmaking process. The company therefore began recalling bricklayers in the order of their length of prior service.

Besides the contractual right of recall for those employees with contractual rights, Wisconsin Steel had a policy that former employees, including bricklayers who did not have contractual seniority rights would nonetheless be recalled according to their length of service. In March 1967, pursuant to this policy and not because of contractual right of recall, Waters was recalled. Waters accepted reinstatement and continued to work until May 19, 1967 when he was once again laid off because of a temporary reduction in plant operations. Waters was recalled on August 30, 1967, but refused this third offer of employment because he had another job and also, because he believed that his return to Wisconsin Steel might prejudice his then pending EEOC charges against Wisconsin Steel which he had filed in May 1966.

With respect to the amendatory agreements to the collective bargaining contract which plaintiffs challenge as discriminatory, the following evidence was adduced at trial. Prior to 1965, Wisconsin Steel, unlike other steel plants, had no provision for severance pay in its collective bargaining agreement with Local 21. However, in March 1965, after the decision had been made to lay off eight white bricklayers having five to six years seniority, the

company negotiated a "severance agreement" with Local 21, dealing exclusively with these eight employees. The agreement provided that after being laid off the eight bricklayers could elect to retain their contractual seniority rights or receive $966.00 in severance pay. An election to retain contractual seniority rights carried with it the risk that these bricklayers would lose their seniority rights anyway after two years on lay-off; this risk was believed to be substantial in view of Wisconsin Steel's anticipated decline in bricklaying needs. Consequently, the eight bricklayers, subsequent to their involuntary lay-off pursuant to seniority, elected to receive severance pay, thereby forfeiting their contractual seniority rights to recall.

As noted earlier, it became apparent to Wisconsin Steel in 1966 that it had underestimated its predicted bricklaying requirement for the basic oxygen process. In view of its new felt demand for bricklayers and its asserted belief that an injustice had been done to the eight bricklayers who had exchanged their contractual seniority rights for $966.00, the company proposed to Local 21 that the March 1965 severance pay agreement be partially nullified by an amendment restoring the eight bricklayers' contractual seniority rights for purposes of recall. Accordingly, an amendatory agreement was entered into in June 1966. Three of the eight white bricklayers who had previously accepted the severance pay also accepted the recall and reurned to work, two in July 1966 and the third in January 1967. In each instance the man was rehired without reapplying with the company for employment.

At trial plaintiffs contended that the June 1966 amendatory agreement was, in effect, discriminatory for it restored contractual seniority status to the three white bricklayers who accepted recall and thereby advanced those three bricklayers ahead of Waters and Samuels on the hiring and recall roster. The defendants countered plaintiffs' contention by arguing that the three bricklayers would have been entitled to prior recall in any event pursuant to the company policy whereby former employees without contractual rights of recall are nevertheless recalled pursuant to their length of prior service.

After submission of the evidence the trial judge made certain findings of fact. He also made the following conclusions of law:

"4. Prior to April, 1964, Wisconsin Steel discriminated in the hiring of bricklayers in violation of 42 U.S.C. § 1981.

5. The seniority system negotiated between defendants Wisconsin Steel and Local 21 had its genesis in a period of racial discrimination and is thus violative of 42 U.S.C. § 1981 and is not a bona fide seniority system under Title VII.

6. By laying off plaintiff Waters in September, 1964, pursuant to the terms of the seniority system of the collective bargaining agreement, defendants violated both § 1981 and Title VII. Defendants also violated § 1981 and Title VII when, in reliance on the seniority system, Wisconsin Steel failed to recall plaintiff Waters in March, 1965, and when it again laid off plaintiff Waters in May, 1967.

7. Defendants June 15, 1966 agreement to amend the earlier severance pay agreement and thereby restore recall rights to an all white group of bricklayers who otherwise possessed no recall rights under the prior severance pay agreement, thereby placing those white bricklayers ahead of black bricklayers, constituted a violation of both § 1981 and Title VII. This violation discriminated against the rights of both plaintiff Waters and plaintiff Samuels."

Pursuant to its decision the district court directed Wisconsin Steel to offer employment to Waters and Samuels and ordered both defendants to share in a back-pay award of $5000 to Waters and $5000 to Samuels. In addition, the court awarded the sum of $5000 as attorneys' fee for plaintiffs' counsel and as a joint liability of the defendants.

We address the following issues in these appeals: (1) Whether the district court properly asserted jurisdiction over either defendant under 42 U.S.C. § 1981; (2) whether an aggrieved plaintiff must exhaust grievance procedures under a collective bargaining agreement before he can initiate a lawsuit under section 1981; (3) whether the trial court's conclusion that defendant Wisconsin Steel discriminated in the hiring of bricklayers prior to April 1964 is clearly erroneous; (4) whether the trial court erred

in concluding that Wisconsin Steel's "last hired, first fired" seniority system is violative of 42 U.S.C. § 1981 and is not a bona fide seniority system under Title VII; (5) whether there was error in holding that defendants' June 15, 1966 agreement to amend the prior severance pay agreement thereby restoring contractual recall rights to an all-white group of bricklayers constituted a violation of section 1981 and Title VII; (6) whether the participation of defendant Local 21 as signatory to the collective bargaining agreement as well as to the two challenged agreements to amend the collective bargaining agreement is sufficient to hold the union liable under section 1981; (7) whether the district court erred in its calculation of the back-pay award; and (8) whether the district court erred in its making the award of attorneys' fees to counsel for the plaintiffs. We affirm in part the district court's finding on liability, but reverse and remand with respect to the questions of back-pay damages and attorney fees.

I

Local 21 opposes the district court's assumption of jurisdiction over it on two grounds: The union contends that the plaintiffs did not justify their failure to file charges against Local 21 with the EEOC under Title VII. In addition, it challenges the standing of Waters to sue the union under section 1981 on the basis that he was not at any relevant time a member of the union.

With respect to the argument of Local 21 that the plaintiffs have failed to prove a reasonable excuse for bypassing the administrative procedures of Title VII, we previously addressed that issue in *Waters* v. *Wisconsin Steel,* 427 F.2d 476 (7th Cir. 1970) where we stated:

> "We hold, therefore, that an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies. We need not define the full scope of this exception here. Nevertheless, we believe that plaintiffs in the case at bar have presented allegations sufficient to justify their failure to charge Local 21 before the Commission.
>
> We rely particularly on the following allegations. The primary charge of racial discrimination made by

> plaintiffs is based on an amendment of the collective bargaining agreement between Harvester and Local 21. That amendment occurred in June 1966 after plaintiffs filed their charge before the EEOC. Until this amendment plaintiffs were, at least arguably, unaware of the participation of Local 21 in Harvester's alleged policy of racial discrimination." 427 F.2d at 487.

The evidence adduced at trial supports plaintiffs' allegation that the collective bargaining agreement amendment occurred after the EEOC charge was filed thereby justifying the by-pass of the EEOC. Moreover, we note and are somewhat inclined to agree with the recent decisions which hold that exhaustion of Title VII remedies, or reasonable excuse for failing to do so, is not a jurisdictional prerequisite to an action under section 1981. *See, e.g., Long* v. *Ford Motor Co.*, 42 U.S.L.W. 2599 (6th Cir. April 30, 1974).

As to the contention that Waters lacks standing to sue under section 1981, Local 21 premises its argument on the assertion that jurisdiction under section 1981 is dependent on a contractual relationship between Waters and the union (which did not exist here for Waters was not a member of the union). Section 1981 assures that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." The subject matter of this suit is cognizable under section 1981 for Waters complains that his right to enter into an employment contract with the company on the same basis as whites was impaired by the joint action of the union and company. It follows that his nonmembership in the union has no bearing on his section 1981 claim against Local 21.[1]

II

Local 21 contends that plaintiffs should be barred from proceeding against the union under section 1981 because they failed to exhaust their contractual remedies under the collective bargaining agreement. The nature of plain-

[1] In addition, jurisdiction over Wisconsin Steel was properly entertained under both Title VII and section 1981.

tiffs' claims however is that of a complaint against racial discrimination in employment and not a labor law action, asserting rights under a collective bargaining contract. Indeed, the focus of this civil rights suit is an attack by plaintiffs on the contract itself as embodying racially discriminatory practices.

Title VII and section 1981 are "parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co.*, No. 72-5847, at p. 10 (U.S. 1974). Consequently, in fashioning a substantive body of law under section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under Title VII for direction. It is well-established that under Title VII there is no exhaustion of contractual remedies requirement. *Alexander* v. *Gardner-Denver Co., supra,* at p. 12; *Rios* v. *Reynolds Metal Co.*, 467 F.2d 54, 57 (5th Cir. 1972); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). Moreover, an exhaustion of remedies requirement does not appear to apply to claims for relief brought under any of the civil rights acts. *See Monroe* v. *Pape*, 365 U.S. 167 (1960); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *D'Amico* v. *California*, 389 U.S. 416 (1967); and *King* v. *Smith*, 392 U.S. 309 (1968).[2] We are of the view, therefore, that plaintiffs could properly proceed against the union under section 1981 without first exhausting any contractual remedies under the collective bargaining agreement.

III

Wisconsin Steel contends that the evidence does not support the district court's holding that "[p]rior to April, 1964, Wisconsin Steel discriminated in the hiring of bricklayers in violation of 42 U.S.C. § 1981." We believe the record supports the conclusion that Wisconsin Steel engaged in racially discriminatory hiring policies with respect to the position of bricklayer prior to the enactment of Title VII.

Wisconsin Steel did not hire its first black bricklayer until April 1964 although blacks had made inquiries seeking employment as early as 1947. In addition, the evi-

[2] Although these cases treated the exhaustion of remedy requirement with respect to 42 U.S.C. § 1983 of the Civil Rights Act, we think the Court's analysis is applicable to actions brought under 42 U.S.C. § 1981.

dence reflects a discriminatory departmental transfer policy whereby blacks hired by Wisconsin Steel as laborers were denied the opportunity available to white laborers to transfer to the bricklayers' apprenticeship program.

It is urged by the company that the "single statistic" of no black bricklayers prior to 1964 is not sufficient to make a showing of discrimination. Although we doubt the validity of this contention (*see Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970); *Parham* v. *Southwestern Bell Tel. Co.*, 433 F.2d 421, 426 (8th Cir. 1970)), we think that the statistical data joined by the evidence indicating repeated attempts by blacks to obtain employment as bricklayers substantiates the trial court's finding of discrimination.

Wisconsin Steel further contends that plaintiffs did not make a showing of past racial discrimination because they failed to prove that black applicants were denied actual job openings. Relying on *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the defendant in effect urges that discrimination can only be shown if there is a precise matching of job openings and job applicants. While a showing of matching might be required where the focus of inquiry is on an "individualized hiring decision," such as in *McDonnell Douglas*,[3] we do not believe such a showing is required, where, as here, the inquiry centers on whether the employer engaged in discriminatory hiring procedures or practices in the past unrelated to the subsequent employment applications. Accordingly, we do not find *McDonnell Douglas* controlling on this issue.

IV

With respect to the validity of Wisconsin Steel's employment seniority system which embodies the "last hired,

[3] In *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), the Court stated that a plaintiff in a Title VII case establishes a prima facie case of discrimination by showing:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

In referring to the foregoing elements, the Court stated in a footnote:

> "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802, fn. 13.

first fired" principle of seniority for job recalls and layoffs, the district court held:

> "5. The seniority system negotiated between defendants Wisconsin Steel and Local 21 had its genesis in a period of racial discrimination and is thus violative of 42 U.S.C. § 1981 and is not a bona fide seniority system under Title VII.
>
> 6. By laying off plaintiff Waters in September, 1964, pursuant to the terms of the seniority system of the collective bargaining agreement, defendants violated both § 1981 and Title VII. Defendants also violated § 1981 and Title VII when, in reliance on the seniority system, Wisconsin Steel failed to recall plaintiff Waters in March, 1965, and when it again laid off plaintiff Waters in May, 1967."

The plaintiffs contend that Wisconsin Steel's employment seniority system perpetuates the effects of past discrimination in view of the facts that blacks will be laid off before and recalled after certain whites who might not otherwise have had seniority had Wisconsin Steel not discriminated in hiring prior to 1964. They argue that such a system facilitates a return to the status quo of the era when Wisconsin Steel hired no black bricklayers. Wisconsin Steel argues, however, that an employment seniority system which accords workers credit for the full period of their employment is racially neutral and as such is a bona fide seniority system within the contemplation of § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). The defendant says that to strike down its employment seniority system would be to countenance reverse discrimination.

It is asserted that here there is an employment seniority system (unlike the departmental or job seniority systems which courts have modified under Title VII) which grants workers equal credit for actual length of service with the employer. Under a departmental seniority system, seniority is measured by length of service in a department while a job seniority system accords seniority on the basis of length of service on a job. The decisions modifying these two forms of seniority systems have routinely involved situations where the employer previously maintained segregated work forces, prohibiting transfers by blacks into various jobs or departments which offered

improved employment conditions. With the advent of Title VII the employer would facially lift the restrictions on transfers but would effectively prohibit transfers through a department or job seniority policy whereby blacks would be given no credit for their previous years of employment with the employer and would be placed at the bottom of the employee roster in the formerly all-white job or department to which they transferred. Often in modifying these discriminatory forms of seniority systems the courts have deployed an employment seniority system as a racially neutral and adequate remedy to the discriminatory impact of the prior seniority systems.

We are of the view that Wisconsin Steel's employment seniority system embodying the "last hired, first fired" principle of seniority is not of itself racially discriminatory or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII. To that end we find the legislative history of Title VII supportive of the claim that an employment seniority system is a "bona fide" seniority system under the Act. The history points out that:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them *special seniority rights at the expense of the white workers hired earlier.* (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)" Interpretative Memorandum of Senators Clark and Case, 110 Cong. Rec. 7213 (April 8, 1964). (Emphasis added).

In response to written questions by Senator Dirksen, one of the Senate floor managers for the bill, Senator Clark,

emphasized that the "last hired, first fired" principle of seniority would be preserved under Title VII:

> "Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?"
>
> "Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race." 110 Cong. Rec. 7217 (April 8, 1964).

Moreover, to alleviate any further doubt as to the meaning of Title VII, Senator Clark obtained an interpretative memorandum from the Department of Justice which indicated that "last hired, first fired" seniority rules would be valid under Title VII:

> "Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is low man on the totem pole he is not being discriminated against because of his race." 110 Cong. Rec. 7207 (April 8, 1964).

In *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968), the district court was faced with a proposal by the plaintiffs, akin to that presented here, in derogation

of the employment seniority of white workers. There, after a thorough analysis of the legislative history of Title VII, Judge Butzner wrote:

> "[T]he plaintiffs' proposal, while not ousting white employees from present jobs, would prefer Negroes even though they might have less employment seniority than whites. Nothing in the act indicates this result was intended." 279 F.Supp. at 519.

Similarly, the Fifth Circuit in passing upon the legislative history of Title VII stated:

> "No doubt, Congress, to prevent 'reverse discrimination' meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination. As the court pointed out in *Quarles,* the treatment of 'job' or 'department seniority' raises problems different from those discussed in the Senate debates: 'a department seniority system that has its genesis in racial discrimination is not a bona fide seniority system.'" 279 F.Supp. at 517.

"It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guarar y that the new employees had actually suffered exclusion at the hand- of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, *creating fictional employment time for newly-hired Negroes would comprise preferential rather*

than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race.

> "We conclude, in agreement with *Quarles,* that Congress exempted from the anti-discrimination requirements only those seniority rights that gave white workers preference over junior Negroes." *Local 189, United Papermak & Paperwork* v. *United States,* 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). [Emphasis in original and added].

Title VII mandates that workers of every race be treated equally according to their earned seniority. It does not require as the Fifth Circuit said, that a worker be granted fictional seniority or special privileges because of his race.

Moreover, an employment seniority system is properly distinguished from job or department seniority systems for purposes of Title VII. Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal or greater length of service. Under the employment seniority system there is equal recognition of employment seniority which preserves only the earned expectations of long-service employees.

Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430-31 (1971).

We are not, however, insensitive to the plaintiffs' argument, and think employers should be discrete in devising an employment seniority system. We recognize that it is a fine line we draw between plaintiffs' claim of discrimination and defendants' countercharge of reverse discrimi-

nation. On balance, we think Wisconsin Steel's seniority system is racially neutral and does not perpetuate the discrimination of the past.[4]

V

We come finally to the pivotal issue in determining liability: whether the June 15, 1966 agreement between Local 21 and Wisconsin Steel to amend an earlier severance pay agreement and thereby recall three white bricklayers who had accepted severance pay under the initial agreement discriminated against the plaintiffs in violation of Title VII and section 1981. In light of Wisconsin Steel's past history of racially discriminatory hiring practices and the racially neutral yet potentially discriminatory impact of the employment seniority system utilized by the company, we hold that the June 1966 agreement reinstating contract recall rights to three white bricklayers was racially discriminatory with respect to Waters, but not discriminatory with respect to Samuels.

The defendants contend that the restoration of contractual seniority rights to the white bricklayers who had previously accepted severance pay did not discriminate against the plaintiffs for it is claimed that the white bricklayers would have been entitled to prior recall in any event in accordance with company policy. As we noted earlier, that policy, pursuant to which plaintiff Waters was himself recalled, provided that former employees without contractual rights of recall would nonetheless be recalled in order of their length of prior service. We do not doubt that a policy favoring recall of a former employee with experience even though white before considering a new black applicant without experience comports with the requirements of Title VII and section 1981. To that end, we do not perceive any discriminatory impact with respect to Samuels who was a new applicant.

With respect to Waters, however, the company policy occupies a different posture. At the outset we note that it is not entirely clear what the company policy was with

[4] Having passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981.

respect to the priority status of the white bricklayers who had accepted severance pay vis-à-vis employees such as Waters who possessed no contractual seniority. Even assuming that the priority of the white bricklayers accepting severance pay emanated from a long-standing company policy and not from an *ad hoc* determination, we are inclined to find that aspect of the company policy to be violative of Title VII and section 1981. We reach such a conclusion due to the fact that Wisconsin Steel through its prior discrimination and its implementation of an employment seniority system occupied a racially precarious position—indeed, at the brink of present discrimination. A company policy of according priority to white bricklayers who had accepted the benefits of severance pay would, in our view, project the company into the realm of presently perpetuating the racial discrimination of the past. The company policy is no defense to the defendants' action in entering the June 1966 agreement restoring contractual seniority to three white bricklayers.

We find the June 1966 agreement, therefore, to be discriminatory with respect to Waters. Moreover, it cannot be urged that the agreement was justified by "business necessity." The practice of restoring contractual seniority to white bricklayers who elected to receive severance pay must be justified, if at all, by a showing of "business necessity." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 431 (1971). In that respect an employment practice "'can be justified only by a showing that it is necessary to the safe and efficient operation of the business.'" *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 797 (4th Cir. 1971), quoting, *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245, 249 (10th Cir. 1970). Defendants' claim of employee-employer goodwill and alleged concern for fear of potential labor strife does not rise to the level of urgency required for a demonstration of business necessity.

VI

Local 21 contends that there is insufficient evidence to support a claim against the union under section 1981. It is enough, however, that the union was an integral party to the June 1966 amendment which discriminated against

Waters. *Johnson* v. *Goodyear Tire & Rubber Co.*, 7 EPD, ¶9233 (5th Cir. 1974). Local 21 therefore shares jointly in the liability of Wisconsin Steel.

VII

Both Waters and defendants join in the contention that the district court erred in calculating the back-pay award to which Waters is entitled. We agree that the trial judge abused his discretion in fashioning the back-pay award. The award was the product of an arbitrary calculation entirely devoid of any reasoned approach to the proper measure of damages. Moreover, the district court's consideration of the absence of a racially discriminatory motive on the part of the defendants was improper. The absence of a discriminatory motive is not a proper basis for denying or limiting relief. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 804 (4th Cir. 1971).

It would appear from the record that but for the June 1966 agreement, Waters would have been recalled on January 17, 1967 and that he would not have been laid off on May 19, 1967. Waters was tendered reemployment on September 5, 1967, which he declined to accept. In our judgment the discriminatory impact of defendants' June 1966 agreement ended with the tender made to Waters in September. The relevant period for computing damages therefore ranges from January 17, 1967 to September 5, 1967.

Plaintiff Waters' damages for the relevant period are to be determined by measuring the difference between plaintiff's actual earnings for the period and those which he would have earned absent the discrimination of defendants. In determining the amount of Waters' likely earnings but for the discrimination, we reject the notion advanced by Waters that since he could have held two jobs while employed at Wisconsin Steel, defendants are therefore liable not only for his lost earnings with Wisconsin Steel but also for his probable lost earnings from a second job. Recompense for economic loss resulting from racially discriminatory practices does not require that we entertain claims of such a speculative and remote nature.

Accordingly, we remand to the district court for findings with regard to Waters' actual and probable earnings for the relevant period.[5]

VIII

All parties condemn the district court's method of computing the award of attorney fees to the plaintiffs' counsel pursuant to section 706K of Title VII, 42 U.S.C. § 2000e-5(K). Although the determination of reasonable attorney fees is left to the sound discretion of the trial judge, *Weeks* v. *Southern Bell Tele. & Tele. Co.*, 467 F.2d 95, 97 (5th Cir. 1972), we are convinced that the method whereby the judge computed the award of attorney's fee was so lacking of analysis that it constituted an abuse of discretion.

In fashioning a method of analysis to assist in determining the amount of attorney fees properly to be awarded in a Title VII action, we cannot subscribe to the view that attorney fees are to be determined solely on the basis of a formula applying "hours spent times billing rate." We recognize however that such a factor is a consideration in making the ultimate award and indeed it is a convenient starting point from which adjustments can be made for various other elements. Other elements to be considered are set out in the Code of Professional Responsibility as adopted by the American Bar Association:

> Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

[5] It would appear that Wisconsin Steel concedes in its brief that Waters would not have been laid off on May 19, 1967 had he been recalled on January 17, 1967. (Defendant's Brief, p. 44.) The record is not clear on this matter. Therefore we direct that there be findings thereon if defendant does not concede the point. It should be noted however that the outer most parameters of defendants' liability extend from January 17, 1967 to September 5, 1967.

73-1822, 73-1823, 73-1824

(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

Disciplinary Rule 2-106.

The Code of Professional Responsibility clearly reflects that an award of attorney fees involves the coalescence of many considerations including the reasonableness of the time spent by counsel, the extent of counsel's success, and the complexity of the case. An analysis by the district court which encompasses the foregoing considerations is most assuredly an analysis well within the bounds of trial court discretion. Accordingly, we remand to the district court for reconsideration of attorneys' fees in light of the aforementioned factors.

The judgment of liability is affirmed in part as to plaintiff Waters and reversed as to plaintiff Samuels. In accordance with Circuit Rule 23 we remand for further consideration on the question of damages and award of attorney fees to plaintiff Waters, consistent with the views expressed herein.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Order of United States Court of Appeals For the Seventh Circuit

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

November 26, 1974

(68 C 2483)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Before:

HON. LUTHER M. SWYGERT, Chief Judge
" JOHN S. HASTINGS, SR., Circuit Judge
" THOMAS E. FAIRCHILD, Circuit Judge
" WALTER J. CUMMINGS, Circuit Judge
" WILBUR F. PELL, JR., Circuit Judge
" JOHN PAUL STEVENS, Circuit Judge
" ROBERT A. SPRECHER, Circuit Judge
" PHILIP W. TONE, Circuit Judge

WILLIAM WATERS AND DONALD SAMUELS,

Plaintiff-Appellees
Cross-Appellants,

No. 73-1822 thru 73-1824 vs.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER CO. and UNITED ORDER OF AMERICAN BRICKLAYERS & STONE MASONS, Local 21,

Defendants-Appellees.

Order of United States Court of Appeals
For the Seventh Circuit

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the active members of the Court having voted to deny a rehearing *en banc,*

It Is Ordered that the petition for rehearing and the suggestion that it be heard *en banc* be, and the same are hereby, Denied.

Judge Fairchild voted to grant said petition for rehearing *en banc.*

Judge Pell disqualified himself from consideration of this matter.

Findings of Fact, Conclusions of Law and Order

In the United States District Court
For the Northern District of Illinois
Eastern Division
No. 68-C-2483

William A. Waters and Donald Samuels,
Plaintiffs,

vs.

Wisconsin Steel Works of International Harvester Company, a Corporation and United Order of American Bricklayers and Stone Masons, Local 21, an Unincorporated Association,
Defendants.

Following the Court of Appeals remand of this cause to the district court, *Waters* vs. *Wisconsin Steel Works,* 427 F.2d 476 (7th Cir. 1970), it was assigned to my calendar for the purpose of conducting a trial on the issues. Sitting without a jury, I have heard the evidence presented by the parties, considered the exhibits submitted by them and have reviewed the stipulations and supplemental stipulations of fact filed with the court by the parties. At the outset it should be observed that plaintiffs have abandoned the class aspect of their complaint and have limited their request for injunctive relief to the hiring of the two individual plaintiffs. Against this background, I hereby make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The stipulations and supplemental stipulations of fact are, to the extent not expressly referred to herein, specifically incorporated by reference and made a part hereof.

2. Plaintiffs William Waters and Donald Samuels are Negro bricklayers residing in Chicago, Illinois and are citizens of the United States.

3. Since the 1920's, defendant Wisconsin Steel Works of International Harvester (hereafter "Wisconsin Steel") has maintained a permanent crew of bricklayers.

4. The number of bricklayers employed at Wisconsin Steel has varied since 1950 between 15 and 58.

5. Since 1944, collective bargaining agreements between Wisconsin Steel and United Order of American Bricklayers and Stone Masons, Local 21 (hereafter "Local 21") have contained seniority provisions relating to layoff, recall and fringe benefits for bricklayers employed at Wisconsin Steel for ninety consecutive days.

6. On August 15, 1962, defendants Wisconsin Steel and Local 21 entered into a collective bargaining agreement.

7. The collective bargaining agreement provided, in pertinent part, that seniority was broken only when (1) "an employee voluntarily leaves the company's service" and (2) "due to layoff because of no work, a period of more than two years has elapsed since the employee last worked for the Company."

8. Under the collective bargaining agreement, employees on layoff for more than two years retained recall priority in the order of their former seniority.

9. It was the policy of Wisconsin Steel to recall laid off employees who had not yet acquired seniority or who had had their seniority broken by the length of the layoff prior to hiring new applicants.

10. Prior to April of 1964, Wisconsin Steel had hired no Negro bricklayers.

11. On at least three occasions between 1949 and 1957, Negro bricklayers sought employment at Wisconsin Steel.

12. Prior to October 9, 1967, Wisconsin Steel had hired no Negro apprentice bricklayers.

13. On at least three occasions prior to October, 1967, Negro laborers in the mason department at Wisconsin Steel had sought to transfer to Wisconsin Steel's apprentice program.

14. The Negroes who had so applied were told that their applications were rejected on the ground that they were too old.

15. One of the rejected bricklayers was told that the age limit was 25 years of age.

16. One of the rejected Negro laborers was less than 25 years of age when his application was denied.

17. A 29 year old white bricklayer was hired into the apprentice program shortly after a Negro laborer had been rejected.

18. In April, 1964, Wisconsin Steel hired its first Negro bricklayer. In Jlne, 1964, four more Negro bricklayers were hired including the plaintiff William Waters.

19. In September, 1964, the latter four Negro bricklayers were laid off pursuant to the seniority provisions of the collective bargaining agreement.

20. On March 2, 1965, defendants Local 21 and Wisconsin Steel entered into a severance pay agreement.

21. The remaining Negro bricklayer was laid off on March 3, 1965 pursuant to the seniority provision of the collective bargaining agreement.

22. Approximately eight white bricklayers also laid off on March 3, 1965 were eligible to accept severance pay and chose to accept severance pay.

23. The election to accept severance pay constituted a severance of the employment relationship under the collective bargaining agreement.

24. On approximately April 2, 1966, the plaintiffs William Waters and Donald Samuels mailed applications for employment as bricklayers to Wisconsin Steel.

25. On June 15, 1966, defendants Wisconsin Steel and Local 21 entered into an agreement to amend the March 2, 1965 severance pay agreement.

26. Three white bricklayers who had accepted severance pay in March of 1965, accepted recall by Wisconsin Steel during June and July, 1966 and January, 1967, respectively.

27. In March, 1967, plaintiff Waters was recalled and returned to work and was thereafter laid off in May, 1967.

28. Plaintiff Waters was recalled in August of 1967 but declined the offer of employment for the stated reasons that acceptance of such employment might prejudice his charge then pending before the E E O C.

29. If defendants had not amended their March 2, 1965 severance pay agreement, those white bricklayers who elected to accept severance pay would have had no recall priorities under the seniority provisions of the prior collective bargaining agreement.

Conclusions of Law

1. The court has jurisdiction of this action and the parties thereto pursuant to § 706 (f) of Title VII, 42 U S C § 2000e-5 (f) and 28 U S C § 1341 and § 1343.

2. Defendant International Harvester Company is a foreign corporation, licensed to do business in Illinois and is an employer within the meaning of Title VII. International Harvester operates a steel plant known as Wisconsin Steel Works which is located in Cook County, Illinois.

3. Defendant Local 21 is a labor organization representing bricklayers employed in Cook County, Illinois and is engaged in an industry affecting commerce within the meaning of Title VII.

4. Prior to April, 1964, Wisconsin Steel discriminated in the hiring of bricklayers in violation of 42 U S C § 1981.

5. The seniority system negotiated between defendants Wisconsin Steel and Local 21 had its genesis in a period of racial discrimination and is thus violative of 42 U S C 1981 and is not a bona fide seniority system under Title VII.

6. By laying off plaintiff Waters in September, 1964, pursuant to the terms of the seniority system of the collective bargaining agreement, defendants also violated § 1981 and Title VII. Defendants also violated § 1981 and Title VII when, in reliance on the seniority system, Wisconsin Steel failed to recall plaintiff Waters in March, 1965, and when it again laid off plaintiff Waters in May, 1967.

7. Defendants' June 15, 1966 agreement to amend the earlier severance pay agreement and thereby restore recall rights to an all white group of bricklayers who otherwise possessed no recall rights under the prior severance pay agreement, thereby placing those white bricklayers ahead of black bricklayers, constitutes a violation of both § 1981 and Title VII. This violation discriminated against the rights of both plaintiff Waters and plaintiff Samuels.

ORDER

1. By reason of the above described violations of § 1981 and Title VII, the defendant Wisconsin Steel is hereby directed to offer the plaintiffs Waters and Samuels employment as bricklayers in its steel plant known as Wisconsin Steel Works and located in Cook County, Illinois.

2. Pursuant to 42 U S C § 2000e-5 (g), and in the exercise of the court's discretion thereunder, the plaintiffs Waters and Samuels are awarded as and for back pay from the Defendants Wisconsin Steel and Local 21, the

sum of $5,000.00 for each plaintiff. In exercising this discretion, I have noted and considered the absence of a racially discriminatory motive on the part of the two defendants. Although the absence of a specific intent to discriminate does not act as a bar to a back pay award, *Robinson* v. *Lorillard Corporation,* 444 F.2d 791, 804 (4th Cir. 1971), it is a proper element of consideration in the exercise of the court's discretion under 42 U S C § 2000e-5 (g). Considering this and the other circumstances of this case, I have made what I consider to be a generous back pay award.

3. As and for reasonable attorneys' fees, counsel for the plaintiffs are hereby awarded from the defendants the sum of $5,000.00. In making the award for reasonable attorneys' fees, I have considered the efforts expended by plaintiffs' counsel both in the Court of Appeals and in the district court.

CAMPBELL
District Judge

Date: May 2, 1973

Supreme Court, U. S.
FILED
APR 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1064

WILLIAM A. WATERS AND DONALD SAMUELS,
Petitioners,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY AND UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1064

WILLIAM A. WATERS AND DONALD SAMUELS,
Petitioners,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY AND UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT INTERNATIONAL HARVESTER COMPANY IN OPPOSITION

The issues presented in the Petition for Certiorari do not arise on the record below. Petitioners' basic misapprehension of the legal and factual issues actually decided by the lower courts is itself one of several reasons for denying *certiorari*. Before discussing the factors which make *certiorari* inappropriate in this case, it is necessary, in view of petitioners' misstatement of material facts, to restate the case.

STATEMENT OF THE CASE

Before the Seventh Circuit, the District Court's decision was attacked by all parties for its arbitrariness. Construing the equal employment opportunity statutes, the Court of Appeals reviewed numerous interrelated questions of liability which turned on facts peculiar to the parties. In its result, the Seventh Circuit strained to affirm the judgment of liability in favor of the petitioner Waters.

Four central aspects of the record are misstated in the Petition for Certiorari. Their correction eliminates the basis for petitioners' claims of error and detracts significantly from the illusory aura of importance which the Petition attaches to this case. The four points are: (1) neither petitioner had suffered discrimination from the alleged early practice of discriminatory hiring which had ended, by petitioners' admission, prior to 1964; (2) the seniority system in issue operated in a racially neutral manner as to petitioners; (3) respondent Wisconsin Steel Works' hiring and recall policies had no discriminatory impact on petitioner Samuels; and (4) Wisconsin Steel's job offer to petitioner Waters in 1967 was *bona fide* and required no waiver by him of any legal claims. As these points suggest, it is essential to an understanding of the Seventh Circuit's narrowly drawn rulings to recognize that this case involves only the unique individual claims of the two petitioners since all class allegations were abandoned prior to trial.

1. The Absence of Findings or Evidence That Petitioners Were Discriminated Against By Claimed Pre-1964 Discriminatory Hiring Practices.

Neither court below found that either of the two petitioners had been discriminated against prior to 1964, when several blacks including petitioner Waters were hired as

bricklayers at respondent Wisconsin Steel Works.* (Plf. Ex. 3; Tr. 18-22).** Petitioner Samuels' only contact with Wisconsin Steel occurred in 1966, when he mailed a racially-anonymous application form to the company at a time when both white and black bricklayers were on layoff. (Def. Ex. 2; Def. Ex. 3, p. 9). Waters' only pre-1964 contact with Wisconsin Steel occurred in the Fall of 1957 during a prolonged period of non-hiring, when he inquired of a plant guard regarding the prospects for employment. (Tr. 16-18). Waters admitted he was told Wisconsin Steel was not hiring bricklayers. (Tr. 16-18, 40). This was true. Undisputed employment records documented that no bricklayer, white or black, was hired over a two-year period from January 14, 1957, to February 9, 1959. (Plf. Ex. 3). No evidence, much less any finding, supports petitioners' pivotal but false premise that Waters himself was a victim of discrimination prior to 1964.

In fact, the Court of Appeals strained to sustain the District Court's conclusory finding that Wisconsin Steel had discriminated in hiring bricklayers prior to 1964. This finding was affirmed under the "clearly erroneous" standard on the following circumstantial evidence: (1) the small contingent of bricklayers at Wisconsin Steel included no black until 1964; (2) on three occasions between 1949 and 1964, a black bricklayer asked about employment during periods

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* The year 1964 is a point of demarcation in this case. In that year several black bricklayers were hired, thus ending the claimed "practice" of discrimination in hiring bricklayers even under petitioners' theory. A specific, unique collective bargaining agreement between the respondents in 1966 was the primary basis for the two petitioners' individual claims of discrimination, apart from the application of the "last hired, first fired" seniority principle to persons, such as petitioners, who did *not* suffer discrimination during the alleged pre-1964 period of discriminatory hiring.

** All factual references herein are to the original trial record.

of extended non-hiring;* and (3) twice between 1946 and 1964, a black laborer had sought admittance into a bricklayers' apprentice program.**

On appeal, respondents challenged the adequacy of this circumstantial evidence, particularly in view of the District Court's erroneous characterization of certain evidence and the District Court's refusal to permit respondents to develop historical rebuttal evidence at trial.*** Respondents also argued that no one of the five unrelated inquiries by black bricklayers or laborers satisfied the *prima facie* case requirements set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The Seventh Circuit held that *McDonnell Douglas* did not apply since the court felt petitioners were not required to prove individual instances

* The undisputed circumstances of these inquiries are summarized below:

Bricklayer	Date of Inquiry	Period of Non-hiring (Plf. Ex. 3)
Pearson (Tr. 61-63)	Fall, 1949	4/21/48 to 5/14/52
Pearson (Tr. 63-67)	"Some time in 1953"	2/13/53 to 11/ 2/54
Waters (Tr. 16-18)	Fall, 1957	2/14/57 to 2/ 9/59

** The undisputed facts concerning these two isolated instances are: witness Watkins testified that he was turned down by the apprentice program in 1946 because he was overage. (Tr. 99-100). Petitioners' other witness, Mays, inquired about the apprenticeship program "around" 1953 and was told that no apprentices were being hired at the time. (Tr. 107-11). No bricklayer *or* apprentice was in fact hired between July 6, 1953 and November 2, 1954. (Plf. Ex. 3).

*** At trial, respondents were cut off from explaining the absence of black bricklayers, after they had proven an affirmative, ongoing recruitment drive directed toward blacks in the 1940's (Tr. 140-43), on the ground that petitioners had abandoned their class allegations and that historical evidence concerning the pre-1964 period was irrelevant. (Tr. 14-16). The trial court's eventual conclusion of past discrimination thus came as a complete surprise.

of discrimination in circumstantially evidencing discriminatory hiring patterns.*

With circular reasoning, petitioners now suggest that even though no individual instance of discrimination was proven for the period prior to Title VII's effective date,** the Court may infer that Waters' Fall 1957 inquiry was in fact a case of individual discrimination. Petitioners assert:

> "Waters first sought a job at Wisconsin Steel during the fall of 1957. *Had he been white he would have been hired at that time,* would have been laid off only infrequently in the following years, and would by now have accumulated 18 years of seniority." (Pet. 11-12).

This assertion is false, as borne out by petitioners' prior inconsistent theory***, their own inconsistent evidence, and the absence of supporting findings by either lower court.

2. The Seventh Circuit's Ruling That the Bricklayers' Seniority System Had No Racially Discriminatory Impact on Petitioners.

Pervading petitioners' arguments is the erroneous and misleading assertion that, "the Court of Appeals did not

* The Seventh Circuit's dispatch of respondents' objections to the finding of past discrimination evidences a "leaning-over backward" for petitioner's sake. If *certiorari* were granted, which it should not be, it would be appropriate for the Court to scrutinize the finding of past discrimination, including (a) the trial court's preclusion of relevant evidence, (b) the trial court's erroneous findings, (c) the inadequacy of statistical inferences drawn from such a small group with infrequent hiring and an unknown application rate, and (d) the application of the *McDonnell Douglas* decision to petitioners' circumstantial evidence of five isolated inquiries made over an eighteen-year period, from 1946 to 1964.

** Title VII of the 1964 Civil Rights Act became effective on July 2, 1965 (78 Stat. 253).

*** Neither petitioners' Complaint nor their post-trial submissions urged that Waters' Fall 1957 contact with Wisconsin Steel was an instance of individual racial discrimination. (*See* Complaint ¶ 8; Plfs. Prop. Find. & Conc. ¶¶ 10-18).

deny . . . that the seniority system had the effect of continuing the discriminatory impact of that [pre-1964] misconduct." (Pet. 15). In fact, the Seventh Circuit explicitly held to the contrary: the seniority system did *not* perpetuate past discrimination on the facts presented.

> "We are of the view that Wisconsin Steel's employment seniority system embodying the last hired, first fired principle of seniority is not of itself racially discriminatory [n]or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII. . . .
>
> . . .
>
> ". . . On balance, we think Wisconsin Steel's seniority system is racially neutral and does not perpetuate the discrimination of the past." (App.* 12a, 16a; 502 F.2d at 1318, 1320).

Plainly, the Court of Appeals did "deny" that Wisconsin Steel's seniority system had the effect of continuing prior racial discrimination.

In the context of petitioners' claims, the Seventh Circuit determined that the seniority system operated in a racially neutral and nondiscriminatory manner. Waters, as a new hire in 1964, and Samuels, as a new applicant in 1966, claimed an outright exemption from the use of an actual-length-of-service principle in determining the order of layoff and recall. Their theory advocated that, regardless of the fairness of the seniority principle to petitioners, the earned seniority of employees with longer service should be discounted because of claimed prior discrimination against others. In other words, certain white bricklayers possessed earned seniority after 1964 which they would not have enjoyed if they had not been hired during the discriminatory

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* "App." refers to the Appendix to the Petition for a Writ of Certiorari, which reprints the decisions below in this case.

period; therefore, according to petitioners, those white bricklayers should be precluded from being treated according to their actual earned seniority as against subsequently-hired blacks, such as Waters, or even subsequent black applicants, such as Samuels. This theory was the narrow issue posed to and rejected by the Seventh Circuit.

On the facts of this case, the Seventh Circuit determined that the "seniority system gives full credit to all bricklayers for their actual length of service or earned seniority as bricklayers." (App. 3a; 502 F.2d at 1313). In addition, Wisconsin Steel had a long standing company policy of recalling former employees, including bricklayers, in the order of their length of service after employees with contractual seniority rights. (App. 4a; 502 F.2d at 1313). After Waters' initial hire in 1964, he was twice laid off and recalled, each time in strict accordance with his seniority. Thus, Waters twice received a priority over new applicants and was affirmatively recalled to work because of the company's respect for his and others' prior service.* In addition to benefiting Waters, the seniority principle resulted in a total of five black bricklayers (24 percent of those laid off and recalled) being offered recall in 1967 ahead of new applicants. (Plf. Ex. 2 & 3). At Wisconsin Steel, the system of "earned seniority" based on actual length of service was racially neutral in operation as well as principle.**

In this factual context, the Court of Appeals decided that neither Waters nor Samuels was entitled to employment

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* The fairness of Waters' layoffs are detailed in the Seventh Circuit's decision. (App. 3a-4a; 502 F.2d at 1313). When Waters refused his second recall, a new black applicant was hired in his place and worked continuously at Wisconsin Steel thereafter. (See Plf. Ex. 3).

** Petitioner Samuels testified that he felt it was fair for persons with seniority to be recalled before new applicants, such as himself, were hired. (Samuels Dep. at 90-91).

privileges in derogation of the earned seniority of longer-service white and black bricklayers.

3. The Purpose and Effect of Respondents' March 1965 Severance Pay and June 1966 Amendatory Agreements.

Apart from the legality of the earned seniority principle as applied to the petitioners, the Court of Appeals reviewed the legitimacy of two related collective bargaining contracts by which respondents first released eight senior white bricklayers and later reemployed three of them. Once again, the appellate court's decision is bottomed on a consideration of the unique facts of this situation* as related to each petitioner.

The two collective contracts came about after Wisconsin Steel estimated a massive plant-wide reduction in personnel, including bricklayers, following its anticipated conversion from twelve open hearths to two basic oxygen furnaces. Wisconsin Steel encouraged eight bricklayers, possessing five to six years of contractual seniority, to accept a severance allowance in March 1965 rather than remain on layoff for two years and lose their seniority rights without any compensatory adjustment. By the next year, Wisconsin Steel realized its bricklaying manpower forecasts had been greatly underestimated. Feeling that it had unintentionally induced eight senior bricklayers into a premature forfeiture of contractual rights, Wisconsin Steel agreed in June 1966 to restore their seniority for recall purposes. Three of the eight bricklayers accepted recall shortly before Waters. (App. 3a-5a; 502 F.2d at 1313-14). Three other black bricklayers with much less experience at Wisconsin Steel were also recalled. (Plf. Ex. 2 & 3).

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* Petitioners themselves acknowledge the uniqueness of this factual situation by terming the contracts a "special *ad hoc* rule" governing recall of the eight bricklayers who had accepted severance pay. (Pet. 11 n. 11).

The labor relations significance of this unique situation is obvious. The person negotiating the contracts for Wisconsin Steel was responsible for union relations and was solely concerned with defusing a potential labor disruption over the company's conduct. He was not involved in the hiring process and did not know the race of any of the bricklayers involved. (Tr. 171, 177, 187-89). The trial court explicitly found an "absence of a racially discriminatory motive on the part of the two [respondents]."* (App. 29a).

Despite respondents' good faith and legitimate business reasons for entering into the two collective agreements,** the Seventh Circuit affirmed liability as to Waters, while reversing as to Samuels. The court decided that placing white bricklayers who had accepted severance pay ahead of former employees, such as Waters, on the recall roster was an improper application of the length of service standard.*** (App. 17a; 502 F.2d at 1321).

With respect to Samuels, the Court of Appeals found that different considerations governed:

> "We do not doubt that a policy favoring recall of a former employee with experience even though white before considering a new black applicant without experience comports with the requirements of Title VII and section 1981. To that end, we do not perceive any discriminatory impact with respect to Samuels who was a new applicant." (App. 16a; 502 F.2d at 1320).

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* Petitioners ignore the unchallenged finding that respondents acted with no racial animus. (See Pet. 7-8, 29).

** The Seventh Circuit rejected the applicability of the *McDonnell Douglas* standards for judging an individual claim of discrimination in connection with the 1965 and 1966 agreements.

*** The Seventh Circuit also rejected Wisconsin Steel's position that, just as Waters was entitled to the benefit of the company policy regarding recall of former employees without contractual seniority, so were the white bricklayers who had been induced to give up their contractual seniority.

On these facts, the court approved the legitimacy of using a "past experience" criterion in making individual hiring decisions. Significantly in this case, Wisconsin Steel's use of a "past experience" or "former employee" preference over new, untested applicants ensured the recall of Waters and three other black bricklayers before new applicants were hired. Because Waters and other blacks were benefited by the company recall policy, petitioners have never attacked its validity or racial neutrality despite the fact this policy too is based on actual length of service.

Other facts important to the appellate court's judgment as to Samuels are completely ignored in the Petition. *First,* Wisconsin Steel never knew Samuel's race until the Complaint was filed, since he mailed his application for work and the application form did not permit racial identification. (Tr. 171, 177, 187-89; Def. Ex. 3, p. 9). *Second,* the first new bricklayer applicant hired in 1967 happened to be black (Mills) and remained at Wisconsin Steel without layoff. (Plf. Ex. 3). *Third,* the recall of former employees was never shown to have an adverse disproportionate effect on blacks. (See Plf. Ex. 2 & 3).

Petitioners' unfamiliarity with the record is once more revealed in their patently erroneous assertion that the "former employees hired instead [of Samuels] were, because of the company's previous policy of discrimination, all white." (Pet. 12). One bricklayer (Maten) with contractual seniority recalled in January 1967 was black. (See Plf. Ex. 2 & 3). Moreover, Waters himself was recalled in March 1967. He was the fifth black on the recall roster to be offered reemployment. (*Ibid.*)

4. Waters' Voluntary Decision Not to Accept Reemployment at Wisconsin Steel.

As the Seventh Circuit determined, due to the June 1966 amendatory agreement, Waters was recalled to work in March 1967 instead of January 1967 and was laid off from

May 1967 until September 1967, at which time he was recalled a second time. (App. 18a; 502 F.2d at 1321). At the time of his second recall, Waters was working elsewhere as a bricklayer and he declined the offer. (Plf. Ex. 4 & 5; Tr. 29-31, 36). If Waters had accepted recall, he would have received the full journeyman bricklayer's wage rate, worked continuously from that date forward, and earned contractual seniority. (Plf. Ex. 2, pp. 10-11). On these particular facts, the appellate court ruled that the "discriminatory impact of defendants' June 1966 agreement ended with the tender made to Waters in September [1967]." (App. 18a; 502 F.2d at 1321).

As before, petitioners seriously misstate the record supporting this ruling. Petitioners first contend that Wisconsin Steel conditioned recall on a waiver of Waters' claim. In fact, Waters was never asked to waive anything. As petitioners admitted before the Seventh Circuit, Waters would have been asked only to sign a standard form related solely to computation of seniority under the collective bargaining agreement. (Plf. Brief, p. 16). However, Waters never went to Wisconsin Steel in September 1967 and was not asked to sign even this standard form.

Next, petitioners frivolously state that Wisconsin Steel neglected to assure Waters it would not argue that his execution of the standard form on his return to work constituted a waiver. (Pet. 27). The fact is that previously, in March 1967, Waters had accepted recall and had signed the standard form. (See App. 4a; 502 F.2d at 1313). Wisconsin Steel had never indicated that Waters' action in March was any kind of waiver, and there is no basis for arguing that identical action by Waters a few months later would have been so construed by anyone.

Finally, petitioners contend that Waters was justified in refusing recall because he feared layoff and had a more secure job. (Pet. 28). Undoubtedly, Waters did have a different job which he preferred in September 1967; but his voluntary decision to keep that job instead of accepting

recall affords no equitable basis for making Wisconsin Steel a perpetual insurer of Waters' income.

Petitioners are guilty of hyperbole as well as misstatement. They charge that the recall offer was a "deliberate and callous attempt by Wisconsin Steel to sabotage Waters' pending claim." (Pet. 29). Petitioners ignore the unchallenged finding that respondents acted *without* invidious motive and the undisputed fact that the recall offer was routinely made from the automatic application of company recall policy. Far from "sanctioning sabotage" (Pet. 29), the Court of Appeals merely determined on these facts that Wisconsin Steel's reemployment offer in September 1967 was reasonable.*

REASONS FOR DENYING THE WRIT

Most fundamentally, the Petition should be denied because the "questions presented" do not fairly arise from the record below. Petitioners assume nonexistent facts, advance contentions not presented below, and extrapolate rulings never rendered by the Court of Appeals. The resulting errors irreparably impair the Petition's arguments and make the issuance of a Writ of Certiorari highly inappropriate.**

Moreover, the Seventh Circuit's actual rulings adverse to petitioners were soundly decided and create no conflict with decisions of other Courts of Appeal. The appellate decision was carefully drafted to resolve the unique legal issues posed by the facts of this case and was expressly

* This determination is particularly sound since Waters' "claim" for damages back to 1964 (or, as now argued, to 1957), urged in the Petition as a reason for refusing recall, eventually was held invalid.

** See *Tyrrell* v. *District of Columbia*, 243 U.S. 1, 4 (1917); *Furness, Withy & Co.* v. *Yang-Tsze Insurance Ass'n., Ltd.*, 242 U.S. 430, 431, 434 (1917).

limited in this regard. Under these circumstances, also, the Petition should be denied.

I.

The Court of Appeals Decided Wisconsin Steel's "Last Hired, First Fired" Seniority Rule Was Not Discriminatory And Thus Never Reached the Questions of Remedial Authority Presented In the Petition.

Petitioners miss the entire thrust of the Seventh Circuit's decision sustaining Wisconsin Steel's seniority system. Although the appellate court determined the seniority system did *not* perpetuate past discrimination, petitioners have turned the decision on its head and have persuaded themselves that the court actually found the seniority system to have "perpetuated the effects of past discrimination" and to have had a "discriminatory impact on black employees and job applicants." (Pet. 2). Proceeding from this erroneous assumption, petitioners derive a non-existent question of law:

> "The Court of Appeals did not deny that [the use of 'last hired, first fired' seniority] served to perpetuate the effects of past discrimination, but held that such discrimination enjoyed absolute immunity from legal attack because of Section 703(h) of Title VII of the 1964 Civil Rights Act. . . .
>
> ". . . The critical issues of employment discrimination law at present involve remedies. *This case presents important questions involving the scope of remedial authority vested in the district courts once discrimination has been established.*" (Pet. 8-9).

In short, petitioners misconceive the Seventh Circuit's decision to be a ruling on "remedial powers" in the mold of *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th

Cir. 1974), *cert. granted* (No. 74-728, March 24, 1975).* The analogy is false and the coattails of the Writ in *Franks* do not extend to the present case.

The Court of Appeals held that Wisconsin Steel's bricklayer seniority system was genuinely nondiscriminatory and was therefore preserved by Section 703(h) of the 1964 Civil Rights Act. This ruling reflected two facts: (1) petitioner Waters was not shown to have been a victim of discrimination in hiring; and (2) even were it otherwise, the bricklayers' seniority system gave every worker full and equal credit for his actual length of service in determining layoffs and recalls. Since the respondents' seniority system was racially neutral, the Seventh Circuit never reached the difficult problems involved in fashioning equitable relief against a discriminatory seniority system. The Court of Appeals' decision was confined to Waters' basic charge of race discrimination, which the facts of this case did not sustain: "we think Wisconsin Steel's seniority system is racially neutral and does not perpetuate the [alleged] discrimination of the past." (App. 16a; 502 F.2d at 1320). *Nowhere do petitioners challenge directly or seek review of this pivotal conclusion on the merits.*

Petitioners miss the fundamental difference between employers' *substantive obligations* under Title VII and Section 1981, on the one hand, and the *equitable remedies* available

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* Petitioners repeatedly and incorrectly characterize the opinion below as holding that seniority systems that discriminate in the present day are immune from redress. The Seventh Circuit confronted no question of "the scope of remedial authority vested in the district courts once discrimination has been established." (Pet. 12). Nor did the Court of Appeals "read 703(h) [of Title VII] as establishing a *per se* rule that any contractual seniority system . . . is excluded from the reach of Title VII regardless of whether it has a discriminatory impact." (Pet. 15-16). Petitioners' doomsday interpretation of the result below has no basis in reality.

to employees *after* a violation of those provisions has been proven.* Thus, in *Franks* v. *Bowman Transportation Co.*, and in numerous other cases cited by petitioners (*see* Pet. 9 n. 7, 13-14, 17-21), the courts faced departmental or job seniority systems that had the effect of gerrymandering seniority rights and of denying minority workers full credit for their actual length of service. In those cases, discrimination was found in the operation of the seniority systems, and the difficult judicial questions were indeed the formulation of appropriate remedial decrees. By contrast, in this case, the Court of Appeals held not that petitioners' remedies were limited by Section 703(h), but rather that petitioners' rights had not been violated by the seniority system. The Seventh Circuit expressly distinguished respondents' actual-length-of-service seniority rule from discriminatory departmental or job seniority systems. (App. 11a-12a; 502 F.2d at 1318-20).

Petitioners do not seek review of the validity of Wisconsin Steel's seniority system. Their questions and arguments are framed so as to overarch all types of seniority issues under the civil rights laws; thus, they suggest treating the entire complex of "possible legal situations" through a set of multifaceted "instructions" from the Court. (*See* Pet. 10-11, 16). This sweeping request for a subject-matter Writ is plainly inappropriate. Moreover, petitioners' mischaracterization of the Seventh Circuit's seniority ruling provides their only vehicle for finding "conflict" and "error" in support of the Petition. Stripped of its artificiality and generality, the Petition offers no basis on which the Writ should issue.

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* In *Milliken* v. *Bradley*, 418 U.S. 741, 745, 747 (1974), the Court pointed out the impropriety of fashioning a broad equitable remedy without first establishing a substantive violation of the law.

II.

The Seventh Circuit's Decision Upholding Respondents' Seniority System Reflected Unequivocal Legislative History and Absolute Consistency Among the Circuits.

The Court of Appeals decided the narrow question whether respondents' strict and neutral application of a "last hired, first fired" seniority rule comported with the nondiscrimination requirements of Title VII and Section 1981. The Seventh Circuit upheld that seniority rule, finding undiluted confirmation of its decision both in the relevant legislative history and in analogous judicial rulings. (App. 11a-15a; 502 F.2d at 1317-20). Those authorities acknowledge that the touchstone of the law is whether the employer honors each worker's earned seniority and thus gives equal effect to "white" and "black" time actually spent in the employer's service.

When the 1964 Civil Rights Act was under consideration, Congress took extraordinary steps to record its purposes and, among them, to ensure the survival of legitimate seniority concepts. Title VII of the original House Bill, H.R. 7152, was written in broad terms and sent directly to the floor of the Senate. See EEOC, *Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, 9-10. Since there were to be no Senate Committee Reports, bipartisan co-captains were appointed to provide detailed interpretations of the various titles, and Senators Clark and Case were assigned to Title VII. 110 *Cong. Rec.* 4858-59 (March 10, 1964). The exegetical stature of their interpretative work was well known to the Senate and has since been relied on by this Court. *Griggs* v. *Duke Power Co.* 401 U.S. 424, 434-35, 434n.11 (1971)•

• See also *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 547 nn.5, 6 (1971) (Marshall, J., concurring); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Quarles* v. *Phillip Morris, Inc.*, 279 F.Supp. 505, 516 (E.D. Va. 1968). Petitioners themselves rely on the Clark-Case memoranda as legislative history at one point (Pet. 23), only to disparage their relevance shortly thereafter (Pet. 24-25).

Thus, when the bill was under consideration, Senators Clark and Case offered a detailed interpretative memorandum on Title VII and other explanatory documents that are reviewed in full in the opinion of the Court of Appeals. (*See* App. 12a-13a; 502 F.2d at 1318-19). They emphasized that the "last hired, first fired" principle of seniority would be valid under the Act, even if there had been discrimination in the past, and would not constitute discrimination by reason of race. 110 *Cong. Rec.* 7217 (April 8, 1964). The Clark-Case analysis of the "last hired, first fired" seniority concept is the clearest imaginable documentation of Congressional understanding.•

• Contrary to petitioners' assertions (Pet. 25), there is no chronological disability in the Clark-Case memoranda as interpretive guides to Title VII. After those memoranda were prepared, some Senators had still feared that the language of H.R. 7152 would be given broader meaning than was intended. Specific clarifying amendments were thus included by Senators Dirksen, Mansfield, Humphrey, and Kuchel in the bill as it was eventually enacted on July 2, 1964. See EEOC, *Legislative History* at 10-11. Among those amendments was Section 703(h) relating to seniority. Senator Humphrey expressly negated any suggestion that the amendments altered the prior construction of the bill offered by Senators Clark and Case: "The basic coverage and the substantive prohibitions of [Title VII] remain almost unchanged. . . . [N]or have there been any significant changes in the sections specifying what actions constitute unlawful employment practices." 110 *Cong. Rec.* 12,721 (June 4, 1964). Senator Humphrey further explained that the amendments had been added in order to "remove certain ambiguities and uncertainties which existed in the House text." 110 *Cong. Rec.* 12,725 (June 4, 1964). Petitioners' attempt to separate Section 703(h) from the legislative history by inventing a "new civil rights bill" of May 26, 1964 (*see* Pet. 25) is simply frivolous.

These facts of legislative history were fully detailed to the Seventh Circuit in two rounds of briefs. Petitioners, though, have never seen fit to respond. They persistently ignore this Court's reliance upon the April 1964 Clark-Case memoranda in construing the "testing" provision of the same Section 703(h) in *Griggs* v. *Duke Power Co.*, 401 U.S. at 434-35, 434 n.11.

Moreover, the Seventh Circuit's decision upholding respondents' "last hired, first fired" seniority rule as nondiscriminatory finds no conflict in the decisions of other Circuits. Specifically, no other Circuit has ruled in circumstances where (1) the only alleged discrimination relating to the seniority system pre-dated Title VII and where (2) no plaintiff could show himself to have been an actual victim of discrimination in hiring even in the pre-1964 period.*

The authority that does exist, though, endorses the result reached in this case. On a general level, this Court explained in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-431 (1971), that:

> "[Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.* What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

On the specific question of "last hired, first fired" seniority, the Fifth Circuit established the correct perspective in *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980, 994-95 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). After a careful review of the pertinent legislative history, the Fifth Circuit modified certain features of the seniority system but found no discrimination in a length-of-service criterion that fairly reflected actual

* As discussed at pp. 2-5, *supra*, petitioner Waters neither contended nor established that he was an individual victim of discrimination prior to 1964. Petitioners' argument that a "last hired, first fired" system perpetuates discrimination is therefore meaningless within the factual confines of this case.

service with the employer.* (416 F.2d at 994-95) (*See* App. 14a-15a; 502 F.2d at 1319).

More recent Circuit decisions have gone well beyond the present case, upholding a strict usage of employment seniority even where (1) the alleged discrimination in hiring post-dates Title VII, and (2) there are known victims of discriminatory hiring practices who may have timely substantive claims for an initial refusal to hire. See *EEOC* v. *Detroit Edison Co.*, 9 E.P.D. ¶ 9997 (6th Cir. 1975); *Jersey Central Power & Light Co.* v. *IBEW Local Unions*, 9 FEP Cases 117 (3d Cir. 1975). The result in these cases would mandate the Seventh Circuit's present decision *a fortiori*. But, each leaves the Seventh Circuit's narrow holding far behind and proceeds into issues of present hiring discrimination and seniority remedies that are not presented on the record of this case.

Moreover, petitioners have cited no Circuit decision that in any way conflicts even in principle with the appellate ruling in this case.** Their authorities fall into several groupings, each fundamentally distinct from the Seventh Circuit's decision. *First*, petitioners cite cases where the courts have approved seniority relief for independently

* *Local 189* was essentially a decision on various allegations of *discriminatory impact* arising from the seniority system. Thus: "No stigma of preference attaches to recognition of time actually worked in Negro jobs as the equal of white time. The individual victims of prior discrimination in this case would necessarily be the ones—the only ones—to benefit by the institution of mill [employment] seniority, as modified in the decree." (416 F.2d at 495). In *Franks* v. *Bowman Transportation Co.*, on the other hand, the Fifth Circuit extended the earlier decision and created limitations on the use of "constructive seniority" to remedy *proven incidents of discriminatory hiring*. (*See* 495 F.2d at 417-18).

** Two district court rulings do conflict in limited respects with the Seventh Circuit's decision. The first, *Watkins* v. *United Steel Workers Local No. 2369*, 369 F.Supp. 1221 (E.D. La. 1974), is currently pending on appeal before the Fifth Circuit. The second, *Delay* v. *Carling Brewing Co.*, 9 E.P.D. ¶ 9877 (N.D. Ga. 1974), relied on *Watkins* but conceded that its result was contrary to Congress' intent.

proven violations of Title VII. See, *e.g., Meadows* v. *Ford Motor Co.*, 9 E.P.D. ¶ 9907 (6th Cir. 1975). These decisions, like *Franks* v. *Bowman Transportation Co.*, involve questions of remedial power rather than substantive concepts of discrimination.

Second, petitioners rely improperly on union hiring-hall cases. See, *e.g., United States* v. *Sheet Metal Workers, Local 136,* 416 F.2d 123, (8th Cir. 1969). Such cases not only involve proven discriminatory impact, unlike the present case, but also distinguish themselves from employers' seniority systems. Thus, Senators Clark and Case indicated, in contrast to "last hired, first fired" seniority, that waiting lists which had been maintained on a discriminatory basis "may be held an unlawful subterfuge" if used *after* the enactment of Title VII. 110 *Cong. Rec.* 7213 (April 8, 1964), quoted in *United States* v. *Sheet Metal Workers, supra,* 416 F.2d at 134n.20.

Third, petitioners cite decisions dealing with criteria for promotions, job assignments, and overtime, which again involve proven discriminatory policies. See, *e.g., Rowe* v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972). Moreover, none of these cases involve layoffs and recalls. Nor do they apply Title VII retroactively to allegations of discrimination prior to the effective date of the Act so as to invalidate a neutral seniority system approved by Title VII.*

The Court of Appeals ruled narrowly and correctly in the present case. Petitioners mischaracterize the Seventh Circuit's decision as a blanket safeguard for established seniority rights, creating *per se* rules in favor of discriminatory seniority systems (Pet. 15-16) and flatly prohibiting the use of seniority remedies for proven unlawful discrimination (Pet. 9). The Seventh Circuit did none of these things. On the facts of this case, its decision is no vehicle for deciding the broad and ill-defined seniority issues that petitioners seek to raise.

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* As with the legislative history, all of petitioners' purported case analogies were developed in briefs below and were passed upon by the Seventh Circuit.

III.

Petitioners Totally Misconceive the Seventh Circuit's Ruling Under 42 U.S.C. § 1981.

Petitioners' claim under 42 U.S.C. § 1981 suffers the same infirmities as their claim under Title VII. Their argument regarding the earlier Civil Rights Act is premised, once again, on a fundamental confusion between substantive concepts of employment discrimination and the remedial features of the civil rights laws. Petitioners assert that the procedural and remedial independence of Title VII and Section 1981 warrants the creation of two sustantively inconsistent bodies of law.* They persistently ignore the Seventh Circuit's clear ruling that respondents' seniority system *caused no racial discrimination* and *perpetuated no racial discrimination.*

The Court of Appeals did not hold that Section 1981 remedies were subordinate to Title VII; nor did it hold that the subject-matter scope of Section 1981 was limited in any way by Title VII. The Seventh Circuit ruled only that, within their area of subject-matter overlap, the two statutes should be construed consistently with respect to employers' substantive obligations. Thus, "Having passed scrutiny [as being nondiscriminatory] under *the substantive requirements* of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981." (App. 16a, n.4; 502 F.2d at 1320 n.4). This ruling was preceded in the Seventh Circuit's opinion with an explanation of the proper interaction of the two statutes:

> "Title VII and Section 1981 are 'parallel or overlapping remedies against discrimination.' *Alexander* v. *Gardner-Denver Co.,* No. 72-5847, at p. 10 (U.S. 1974). Con-

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* Petitioners argue disingenuously at this point. In their Reply Brief to the Seventh Circuit, petitioners themselves stressed that, "If there is an analogous body of law for this Court to look to in fashioning a controlling body of substantive law in Section 1981 lawsuits, it is Title VII." (At p. 14).

The Seventh Circuit faced Samuels' claim on the following record: (1) petitioners had never sought to establish that a preference for former employees had any disproportionate adverse impact upon minority workers; (2) indeed, the evidence of record revealed that this hiring policy did *not* have any discriminatory impact; (3) at least for the time period of Samuels' job application, the District Court expressly found no racially discriminatory intent on the part of the two respondents; (4) Wisconsin Steel had no knowledge of Samuels' race or of the race of any other new job applicant; and (5) the first new applicant hired after Samuels applied also was black. (*See* pp. 8-10, *supra*). On this background, the precise issue posed to the Seventh Circuit was whether Samuels could claim to be a victim of racial discrimination simply because he happened to be black and because the recall of former employees happened to work to his personal disadvantage but not to the disadvantage of blacks generally. The Court of Appeals properly rejected that claim.

The Seventh Circuit recognized a legitimate and nondiscriminatory business reason for Wisconsin Steel's former-employee preference based on "experience," encompassing familiarity with plant operations and proven competence, loyalty, and reliability. This was not a "seniority" criterion, as petitioners suggest. Rather, it was a fundamental differentiation between two classes of workers—a differentiation that need not, and on the record of this case did not, correlate with any disproportionate racial impact.

No Circuit has ruled in conflict with the result in this case. Petitioners rely solely on *Gates* v. *Georgia Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974), which was a vastly different case on the facts and was expressly decided on those facts. (492 F.2d at 296).

Indeed, the court in *Gates* pointed out, as a general proposition, that "experience within the employing corporation is obviously a valid criterion for promotion and transfer."

326 F.Supp. 397, 398 (D.Ore. 1973). This Court, too, has acknowledged that past performance and past loyalty may be legitimate employment criteria: " 'Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust.' " *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 806 n.21, quoting *Garner* v. *Los Angeles Board*, 341 U.S. 716, 720 (1951). In the present case, the Seventh Circuit had no occasion to dwell at length on these obvious considerations, for petitioners had failed at the outset to show either that Wisconsin Steel's past-employee preference was inherently discriminatory against blacks, or that the company could even have known Samuels' race as a foundation for a claim of individual discrimination. (*See* pp. 9-10, *supra*).

On this record, no issue appropriate for *certiorari* is presented by the individual claim of petitioner Samuels.

V.

In Attacking the Period of Liability for Determining Waters' Back Pay Award, Petitioners Misstate the Pivotal Facts and Ignore the Element of Judicial Discretion in Formulating Equitable Relief.

The Court of Appeals affirmed respondents' liability to petitioner Waters for a period in 1967 based on the effect of the June 1966 "amendatory agreement" upon the timing of Waters' recall. (App. 16a-19a; 502 F.2d at 1321-22). The period of damages terminated on September 5, 1967, when Waters declined an offer of reinstatement to the *identical job* at the *same pay* that has been the basis of his claim throughout these proceedings. Waters had no reasonable ground on which to refuse this recall offer, except for the fact that he was employed elsewhere in "a more secure job." (*See* Pet. 28). Petitioners have shown no error in the Seventh Circuit's ruling on these facts, nor any conflict with other Circuit holdings.

Petitioners' misstatement of the pertinent facts has already been reviewed in detail. (*See* pp. 10-12, *supra*). In brief, their "waiver" contention is an unfair and wholly unsupported argument calculated to "generate heat" and "obscure the light" in determining the reasonableness of the Seventh Circuit's ruling. Waters' attack on the September 1967 job offer as being something less than his due seems now to have been based on Waters' invalid claim for seniority and back pay dating from 1964 or 1957. All of Waters' excuses in the Petition for not returning to work disintegrated on the evidentiary record and arguments made in the lower courts.

Waters' attempt to inflate his damages out of proportion to real injury is without support in petitioners' authorities. The original decision in *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F.2d 1038 (3rd Cir. 1973), vacated and remanded 414 U.S. 970 (1973), vacated and remanded 497 F.2d 403 (3rd Cir. 1974), has no precedential force and cannot form the basis of a conflict between the Circuits. The job offer in *Jurinko,* moreover, came in the context of a proposed settlement or waiver of further claim which the EEOC advised the plaintiff to reject as inadequate. (*See* 477 F.2d at 1040; 331 F.Supp. 1184, 1186 (W.D.Pa. 1971)). Waters, in contrast, could have accepted the job he was seeking and still have pursued his legal claim relating to the seniority system, a claim which was ultimately held invalid. In *Williams* v. *Albermarle City Board of Education,* 485 F.2d 232 (4th Cir. 1973), plaintiff was wrongfully terminated as school principal and, unlike petitioner Waters, was offered a *subordinate position* as a teacher. Even then, the plaintiff in *Williams* was held responsible for his unreasonable failure to mitigate damages by refusing the reinstatement offer. See also *Slack* v. *Havens,* 8 E.P.D. ¶ 9492 (S.D.Cal. 1973).

Petitioners overlook the consistency with which all courts have looked ultimately for *reasonableness* in the

behavior of a Title VII plaintiff and in the offer extended to him. The Seventh Circuit's decision rests on the special facts of this case as they bear upon the reasonableness of Waters' conduct. Since Wisconsin Steel routinely offered Waters the job he was seeking and Waters was free to accept and still pursue his claims, no reasonable basis exists for making respondents liable for all differentials in pay attributable to Waters' rejection of the job offer. Any suggestion to the contrary runs to the essential purpose of Title VII and Section 1981 to provide equal employment opportunity.*

CONCLUSION

This case simply does not present the issues raised by the Petition. A fair reading of the appellate court's opinion should persuade the reader that the court was careful to bottom its decision on the unique facts of this case. The court expressly cautioned employers that their reliance on seniority principles must be tempered by great sensitivity for possible unfairness to minorities in order to pass muster under both Title VII and Section 1981. In fact, the affirmance of liability as to Waters highlights the true character of the Seventh Circuit's decision.

In this connection, it should be noted that the Petition often criticizes the Court of Appeals for insensitivity to the spirit and purpose of the civil rights laws. In fairness, the Seventh Circuit through Chief Judge Swygert was one of the first courts in the country to sustain the applicability of Section 1981 to private employment discrimination in the initial appeal of this case. In its second opinion,

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* In addition to the fact that Waters was offered the job he had sought, it would be contrary to the goals of Title VII if an employer had to concede liability and pay past damages in order to avoid future damages—particularly where the employee is free to seek additional remedies under the Act.

challenged by the Petition, the court's concern for racial equality and justice is equally evident.

For the reasons stated, the Petition should be denied.

Respectfully submitted,

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April 16, 1975

Supreme Court, U. S.
FILED
APR 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1064

WILLIAM A. WATERS AND DONALD SAMUELS,
Petitioners,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY AND UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MEMORANDUM IN OPPOSITION OF UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1064

WILLIAM A. WATERS AND DONALD SAMUELS,
Petitioners,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY AND UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MEMORANDUM IN OPPOSITION OF UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21

The Brief in Opposition of respondent International Harvester Company (Wisconsin Steel Works) deals with the petition for certiorari (hereafter "Pet.") in painstaking detail. Nevertheless, we think it appropriate to emphasize briefly the decisive points, a) that petitioners' strained effort to assimilate this case to *Franks* v. *Bowman Transportation Co.,* No. 74-728

must fail, and b) that the Questions Presented simply do not arise on this record.[1]

A. WISCONSIN STEEL DID NOT REFUSE TO HIRE EITHER PETITIONER BECAUSE OF HIS RACE: THE FRANKS CASE IS NOT THIS CASE.

Petitioners assert that "[p]laintiff Waters was rejected for employment by Wisconsin Steel because of his race in 1957" (Pet. 11, n. 11). The documentary evidence shows this statement to be false: No bricklayer, white or black, was hired at Wisconsin Steel from January 14, 1957 to February 9, 1959.[2] Petitioners cite no contrary evidence.[3] As to Samuels, the matter is equally simple. He applied for a job in writing and the Company did not even know whether he was black or white. Therefore, it could not have discriminated against him on the basis of his race.

[1] In laying the foundation for their argument, petitioners set forth four purported "rulings" by the Court of Appeals (Pet. 7, quoting nothing and citing "Pet. 1a-20a", that is, the entire opinion). Three of these (Nos. 1, 2 and 4) relate to questions which are purportedly presented (Nos. 2, 1 and 3 respectively). As we shall develop in the body of our argument, pp. 5-9 *infra*, rulings "(1)", "(2)" and "(4)"were not made, and the related "Questions Presented" are not in this case.

[2] Plaintiffs' (petitioners') exhibit No. 3. (We are lodging the record below with the Clerk of this Court.) Waters applied "during the fall of 1957" (Pet. 12).

[3] Likewise incorrect are petitioners' assertions (Pet. 5, 11-12, citing nothing) that they had alleged in their complaint, and that the District Court had found as a fact, that Waters was initially denied employment because of his race. The complaint (J.A. 1-9) does not even allege that Waters had applied for a job before 1964; its earliest reference to him is that he was hired in that year. (J.A. 3). And the finding attributed to the District Court is likewise nonexistent (See Pet. 24a-27a). Nor, of course, did the Court of Appeals so find.

Thus, petitioners ask this Court to accept as a fact a proposition which was not found by either court below, where the failure to so find is not alleged as error in the Questions Presented, and where the only evidence refutes the petitioners' assertion.

On the real facts, this case differs wholly from *Franks* v. *Bowman Transportation Co.*, No. 74-728, cert. granted March 24, 1975, 43 U.S.L.Wk. 3515 (hereafter "*Franks*"), where, in supporting the petition for certiorari, the United States and the EEOC correctly stated the issue to be "whether a district court, in fashioning a remedy for discriminatory refusals to hire, is precluded from granting seniority credit to qualified persons who were illegally denied employment because of their race."[4] Petitioners in *Franks* likewise described the issue in that case to be whether § 703(h) "precludes a grant of retroactive seniority to discriminatorily rejected job applicants" but erroneously described *Waters* as having decided that issue:

> "At the time the petition was filed, two circuits had ruled on the issue presented by the petition. *Franks* v. *Bowman Transportation Company*, 495 F.2d 398 (5th Cir. 1974); *Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974).[1] Both Circuits held that Section 703(h), 42 U.S.C. § 2000e-2(h), precludes a grant of retroactive seniority to discriminatorily rejected job applicants. On January 25, 1975, the Sixth Circuit adopted a squarely contrary view in *Meadows* v. *Ford Motor Co., et al.*, — F.2d —, 9 EPD ¶ 9907.
>
> [1] Plaintiff Waters filed a Petition for a Writ of Certiorari on this and other issues on February 24, 1975, No. 74-1064."[5]

[4] Memorandum for United States and Equal Employment Opportunity Commission, No. 74-728, p. 3.

[5] Supplemental Memorandum in Support of Petition for a Writ of Certiorari, No. 74-728, p. 1.

Some of the counsel for petitioners in *Franks* also represent petitioners here in *Waters*. Thus, the references to the Court of Appeals' decision in *Waters* and to the petition for certiorari which they had filed herein appear designed to generate momentum for the petition in *Waters* by assimilating it to *Franks*.[6] This tactic must fail, however, because the Seventh Circuit in *Waters*, having no "discriminatorily rejected job applicants" before it, had no occasion to rule, as did the Fifth Circuit in *Franks*, on the seniority or other rights of such persons.

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[6] The timing of their reference to *Waters* is instructive. The petition for certiorari in *Franks* (filed December 10, 1974) did not advert to the Seventh Circuit's decision in *Waters* of August 26, 1974 (rehearing denied November 26, 1974). (If *Waters* had decided the same issue as *Franks* in accord with the *Franks* decision, it would have been the better part of candor, to say the least, for Franks' counsel to advise this Court that there was a new Seventh Circuit decision in accord with the Fifth Circuit decision which they were seeking to have reviewed. But since the Seventh Circuit in *Waters* had *not* decided the *Franks* issue, counsel in *Franks* were entirely justified in not mentioning it.) In the interim the United States and the EEOC as well as the respondent union had agreed that certiorari should be granted in *Franks* by respective submissions of February 6 and February 26, 1974. Additionally, *Meadows* had been decided on January 24, creating a true conflict with *Franks*. Thus, on March 5, 1975 when the petitioners in *Franks* filed their supplemental memorandum, it was almost certain that certiorari would be granted in *Franks* and that the attempt could safely be made to use that case as a vehicle for obtaining certiorari in *Waters*. If it could be made to appear that the Seventh Circuit in *Waters* had decided the same issue that the Fifth Circuit had decided in *Franks*, the grant of certiorari in *Waters* would be almost inevitable.

B. THE QUESTIONS PRESENTED BY THE PETITION HEREIN DO NOT ARISE ON THIS RECORD.

1. In a further effort to reach out for the coattails of *Franks*, petitioners refer to the petition in that case in an asterisked footnote to the second of their Questions Presented, which reads as follows:

> "2. Does section 703(h) preclude the district courts in Title VII actions from providing a remedy for a seniority system which perpetuates the effects of past discrimination and has a discriminatory impact on black employees and job applicants?" (Pet. 2)

In their argument relating to this question, petitioners assert:

> "The Court of Appeals did not deny that the company had discriminated in the past or that the seniority system had the effect of continuing the discriminatory impact of that prior misconduct." (Pet. 15)

Petitioners are wrong; the Court of Appeals *did* so "deny," not once, but twice. Thus, at Pet. 12a the Court said:

> "We are of the view that Wisconsin Steel's employment seniority system embodying the 'last hired, first fired' principle of seniority is not of itself racially discriminatory or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII."

Again, at Pet. 16a, the Court said:

> "On balance, we think Wisconsin Steel's seniority system is racially neutral and does not perpetuate the discrimination of the past."

Petitioners do not challenge that determination in their Questions Presented; instead, they hope that this Court will disregard it. Thus, while the effect of § 703(h) on seniority systems which "perpetuates the effects of past discrimination and has a discriminatory impact on black employees and job applicants", is involved in *Franks,* it does not arise in the petition of *Waters et al.*

2. Further, once it is understood that there was no finding that Waters was illegally denied employment and that the seniority system did not perpetuate past discrimination, it becomes clear that petitioners' first Question Presented does not arise either. That Question reads:

> "1. Do the limitations of section 703(h) of Title VII of the Civil Rights Act of 1964, apply to or restrict the remedies available under 42 U.S.C. § 1981?" (Pet. 2)

But while petitioners here and in the course of their argument strive desperately to formulate the issue in terms of "remedies" (Pet. 7, 9, 12-15, 23-24) and thereby to predicate an argument on *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, the legality of Waters' layoff in 1964 and the rejection of Samuels' job application do not involve an issue of remedy at all, because no underlying violation of Waters' or Samuels' rights calling for *any* remedy had been established.[7] That

[7] As to Waters, the contention that he would not have been laid off in 1964 is based on the false assertion that he had been unlawfully denied a job in 1957 (Pet. 11-12). And as to Samuels, the argument depends not only on the rejected claim that the seniority system perpetuated past discrimination, but additionally on the claim that it perpetuated past discrimination "as to" him (Pet. 12). Since he was a new applicant, there was discrimination "as to" Samuels only if *no* preference for former employees was legal. In order to convey the impression that the seniority system was not racially neutral petitioners assert that "the former employees hired instead [of Samuels] were * * * all white" (Pet. 12). But in fact, at least five bricklayers offered recall under the Company's policy were black, and Waters was one of them (Pl. Ex. 2 & 3). Indeed, the position that any preference for former employees is illegal conflicts with Waters' claim, sustained by the court below, that he was entitled to a statutory preference as a former employee over employees with longer service who had accepted severance pay (Pet. 16a-17a).

issue, which the Court of Appeals decided against petitioners, is not one of remedy but one of substantive liability appears even from petitioners' truncated quotation from the opinion (Pet. 16a, n. 4, quoted at Pet. 13.) And while the Seventh Circuit's discussion of substantive liability under 42 U.S.C. § 1981 was not as elaborate as petitioners would have preferred (Pet. 13), none of their Questions Presented challenges the Court's holding that 42 U.S.C. § 1981 does not forbid the use of a "seniority system [which] is racially neutral and does not perpetuate the discrimination of the past" (Pet. 16a, text and note at n. 4).[8] That holding is obviously correct, and is in nowise inconsistent with *Alexander* v. *Gardner-Denver* (of which the Court was fully cognizant, Pet. 9a) or any other appellate decision cited at Pet. 13-15.[9]

[8] Rather, as we have seen, petitioners assert that the seniority system was found to perpetuate past discrimination, and that the Court of Appeals conceded that the only reason that relief under § 1981 was denied was that it had been repealed by Title VII of the 1964 Act. See Pet. 12, discussed at pp. 5-6 *supra.*

[9] The distinction between the remedial and substantive issue, that is, between the questions which petitioners assert was decided below and the question which actually was decided, appears with special clarity in *Long* v. *Ford Motor Co.,* 496 F.2d 500 (C.A. 6).

(Cont. on next page)

3. Finally, petitioners' Question 3, which is reproduced in the margin,[10] also does not arise on this record. The job offer to Waters was not "conditioned on a waiver by the employee of some or all of his remedies for past discrimination" (Pet. 2). Neither the District Court nor the Court of Appeals found that Wisconsin Steel had insisted that Waters execute a waiver abandoning any statutory right as asserted at Pet. 7, 27, 29.[11] And petitioners neither cite any thing in the record to support the assertion that the Company sought to compel a waiver of Waters' statutory rights, nor quote the language of the document which purportedly sought to exact such a waiver; the record refutes the claim.[12] Thus, it is entirely unjust

There are two parts to the Court's opinion in *Long:* In the first part the Court held, following *Alexander, supra,* that "the availability of § 1981 is not limited by the existence of remedies under Title VII" (*id.* at 504). (That, of course, is the proposition which petitioners say was decided against them by the Seventh Circuit herein, but which that Court actually did not reach.) The second part of the Court's opinion in *Long* dealt with the "merits" and discussed at some length the showing which a plaintiff must make in order to establish a violation of § 1981 (*id.* at 504-06). (That is the issue which petitioners do not discuss, but which *was* decided against them by the Seventh Circuit.)

[10] "3. Is an aggrieved employee's right to additional back pay cut off when he declines to accept a job offer from the defendant employer, where (a) the job offered is less desirable than the job to which he is entitled, (b) the job offered is less desirable than the job he then holds, and (c) the offer is conditioned on a waiver by the employee of some or all of his remedies for past discrimination?" (Pet. 2).

[11] At Pet. 27, petitoners again inject their unfounded contention that Waters was orignally deied employment because of his race. It is noteworthy that Waters himself did not so assert in his self-serving letter to the Company, quoted at Pet. 27-28, n. 39.

[12] While their Petition for Certiorari is conveniently vague, petitioners' brief in the Court of Appeals (p. 16) based the waiver argument on Wisconsin Steel's requirement that a reinstated employee "sign a document stating that any time accumulated while a probationary employee would not be applied toward his seniority". Waters had signed such a document when he was reinstated in March, 1957, and he admitted that under the collective bargaining agreement probationary employees do not accrue seniority (Tr. 37). Even in his letter to the Company (Pet. 27-28, n. 39) petitioner never expressed the fear that by signing this standard form he would waive his statutory rights.

for petitioners to charge that "the Seventh Circuit on the facts of this case sanctioned a deliberate and callous attempt by Wisconsin Steel to sabotage Waters' pending claim by forcing him to choose between waiving his claim for seniority and back pay (if he accepted the job) and waiving any future back pay (if he did not)." (Pet. 29) On this record, the real issue is whether Wisconsin Steel could be forced to choose between giving Waters everything to which he believed himself entitled and thereby losing its right to defend against his claim (if it accepted Waters' conditions), or permitting additional back pay liability to accrue (if it rejected Waters' conditions). Petitioners' misstatement of what the court below ruled evidences their awareness that a candid contention that the law imposes this dilemma on any party would be too plainly lacking in merit to warrant this Court's attention.

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

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REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Petitioners submit this Reply Brief in support of their Petition for a Writ of Certiorari.

As respondents properly recognize, the certworthiness of Questions 1 and 2 involves the relationship of the Seventh Circuit decision in the instant case to the Fifth Circuit decision in *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), cert. granted 43 U.S.L.W. 3515 (1975), No. 74-728. Both the Fifth and Seventh Circuits held that "last hired, first fired" seniority systems were immune *per se* from legal attack. The Fifth Circuit reached this result by holding that it lacked the power to give an aggrieved employee the necessary relief, seniority retroactive to the date on which he was denied a job because of his race. The Seventh Circuit reached this result by holding that such a seniority system was, *as a matter of law*, non-discriminatory. The substance of the Fifth and Seventh Circuit rules is of course the same.

Respondents suggest that the Seventh Circuit decision was based on, or limited to, the facts of this particular case. The portion of the Court of Appeals opinion holding the seniority system non-discriminatory deals exclusively with the language and legislative history of Title VII, and contains no discussion or consideration of the particular seniority system maintained by the Wisconsin Steel Works or its impact on petitioners.[1] The Seventh Circuit's statements that respondents' seniority system did not discriminate was a conclusion of law mandated by its construction of the statute, not a resolution of any disputed fact. In the Court of Appeals respondents expressly sought just this ruling that "[a]s a matter of law, a 'last hired, first fired' seniority system is lawful and cannot be considered an act of discrimination by the employer."[2] Indeed the facts regarding the operation of the "last hired, first fired" system were not seriously in dispute—the system required that preferential treatment be given to white workers who were hired during a period when defendants maintained a policy of not hiring black bricklayers. Whether such a seniority system is unlawful under Title VII or section 1981 poses, as the Seventh Circuit's opinion recognized, questions of law not of fact. The Court of Appeals resolved this matter by adopting a *per se* rule of law that "last hired, first fired" seniority systems were legal. The Third Circuit has so construed the decision below, *Jersey Central Power, etc. Co.* v. *Local*

[1] Respondents quote out of context a statement by the Seventh Circuit that the "last hired, first fired" system does not perpetuate discrimination "in violation of the strictures of Title VII." Respondents deliberately omit the next sentence in the court's opinion, which explains that the basis for the court's conclusion is not the facts of the case but the legislative history of Title VII. Petition, p. 12a.

[2] Brief of Wisconsin Steel, p. 17.

327, 508 F.2d 687, 708-09 (3d Cir. 1975), and employers and unions in at least two other circuits have relied on the decision below as establishing such a rule and conferring complete protection on such systems.[3]

Respondent International Harvester characterizes the Seventh Circuit's refusal to award Waters back pay for the period after September 5, 1967 as within the appellate court's "judicial discretion in formulating equitable relief." Brief of Respondent International Harvester, pp. 25-27. The scope of such discretionary authority to deny back pay is a question already before this Court in *Moody* v. *Albemarle Paper Co.*, No. 74-728. Whatever the scope of that discretion, the Seventh Circuit never gave any explanation for its decision that Waters' right to back pay ended with the disputed job offer of September 5. As respondents' briefs make clear, there were and are disputes as to whether the job offered was conditioned on a waiver or was in all respects the job sought by Waters in his then pending complaint, and as to whether Waters had other reason to believe he would impair his rights if he accepted the job. The Court of Appeals, in

[3] In the Second Circuit the New York City Board of Education has argued "the use of an employment seniority system, which provides that the last hired will be the first fired, in discrimination cases for the purpose of determining which employees are to be laid off for economic reasons has been upheld by the [Court of Appeals] for the Seventh Circuit in *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309 (1974)" Brief in *Chance* v. *Board of Examiners*, No. 75-7161, p. 23.

In the Fourth Circuit the Tobacco Workers' International Union urged "In *Waters* vs. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), the Court held 'bona fide' a seniority system which applied date of hire as the date for determining seniority." Brief in *Patterson* v. *American Tobacco*, No. 75-1259, pp. 9-10.

In responding to the Petition for a Writ of Certiorari in *Franks* v. *Bowman Transportation Co.*, No. 74-728, the United Steelworkers also urged *Waters* established a *per se* rule. Union's Response, p. 3.

cutting off back pay as of September 5, 1967, did not resolve any of these questions; the District Court, in awarding back pay, did not even specify whether or not the amount awarded included compensation for the period after September 5. Whatever may be the discretion of the lower courts under *Moody* in granting or denying back pay, those courts must at the least resolve the underlying disputes of fact and articulate the legal standards being applied.

In opposing Waters' Petition for Writ of Certiorari in this case, No. 74-1064, the union asserts the Seventh Circuit did not hold that respondents had discriminated against Waters. Memorandum In Opposition of United Order of American Bricklayers, pp. 5-8. In seeking Certiorari regarding other aspects of this case, the union takes the opposite position and asserts the Court of Appeals *did* conclude that plaintiff Waters was discriminated against. Petition for Writ of Certiorari, No. 74-1350, p. 8. Although the company appears to agree with the union's position in No. 74-1064, the union's position in No. 74-1350 is in fact the correct one. Petition 9a-10a. Respondents raise a number of other contentions of fact not resolved below, but those contentions, even if upheld, would not establish any defense independent of the questions of law resolved by the Seventh Circuit and regarding which Certiorari is sought.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

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